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THE KNOWING EMPLOYMENT OF ILLEGAL IMMIGRANTS

HEARING
BEFORE THE
SUBCOMMITTEE ON
IMMIGRATION AND REFUGEE POLICY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
EMPLOYER SANCTIONS

SEPTEMBER 30, 1981

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THE KNOWING EMPLOYMENT OF ILLEGAL IMMIGRANTS

WEDNESDAY, SEPTEMBER 30, 1981

U.S. SENATE,
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 412, Russell Building, Hon. Alan Simpson (chairman of the subcommittee) presiding.

Present: Senators Simpson, Grassley, Kennedy, and DeConcini.

Also present: Richard Day, chief counsel and staff director, and Charles Wood, counsel.

OPENING STATEMENT OF ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYONING, CHAIRMAN, SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY

Senator SIMPSON. Good morning. Today the subcommittee's series of hearings on the major issues of immigration law reform continues with the very critical subject of employer sanctions. The series will continue in October, when we will have at least five more hearings.

I will share with you here today the quarters of the Veterans Affairs Committee, which I chair. That is the only way I can find a room around this place. It is not exactly copious, but it is the only one we can have surety of obtaining.

So today we are on the issue of employer sanctions. I continue to believe and know, as many of you do, that the enforcement of our immigration laws is indeed in the national interest. Yet the potential benefits and protections of even the most carefully designed statutory standards for determining who may enter the United States for how long, and under what conditions, will not be available in practice if those statutory standards cannot be enforced.

One of the problems, of course, is that some individuals and companies derive very great short-term economic benefits from uncontrolled immigration. However, what is in the short term and purely economic interest of certain industries or even of existing American consumers is not necessarily in the overall interest of the Nation, either long term or short term. Illegal immigration can produce adverse impacts which should be balanced against any short-term economic benefits to certain industries or consumers. I do not intend to review those adverse impacts at this time. If the use of foreign workers is, on balance, beneficial under certain circumstances and conditions, then the law, I think, should reflect that by allowing legal use of the worker when those conditions are present. Obviously, however, the net benefit will not be obtained if such conditions cannot be enforced.

I am one of those who has the opinion that enforcement of the immigration laws will not be achieved without employer sanctions. At the present time it is my view that conventional law enforcement approaches would not be adequate to control illegal border crossings or visa abuse even if substantially more resources were devoted to that effort than appears to be at all likely or possible at the moment, given domestic political and foreign policy considerations.

We all know the facts, the thousands and thousands of miles of sea and land border. It is impossible to completely monitor it at any reasonable level of law enforcement activity. At the present time there are only 22,233 border patrol officers, with only about 450 patrolling at any one time. Even if the border patrol budget were more than doubled—which is obviously quite unlikely—a substantial level of illegal border crossings would continue.

Furthermore, a significant portion of illegal aliens enter legally and then violate the terms of their visa. No amount of border enforcement is going to keep them out.

At the present time there is a substantial disparity in job opportunities between the United States and the Third World countries, a disparity which is very likely to continue or to widen as a result of political and social conditions in those countries. As long as greater U.S. job opportunities are available to foreign nationals who succeed in physically entering the United States, this intense migration pressure on the United States will continue.

Migration pressure on the United States will decline only if the pull of U.S. employment is eliminated or this disparity is reduced—either through improved living standards in the Third World or, I suppose, through deterioration in the United States. Since improvement in the Third World is a long-term prospect, at best, though a laudable one, and since deterioration in the United States is certainly not an attractive resolution, it seems to me that one approach remains. Simply to reduce the availability of U.S. job opportunities through sanctions or penalties against the employment of illegal immigrants.

That is the subject of our hearing throughout this day. I look forward to the testimony of each of you. So we will proceed. I think you have all been advised of the time limitations which have been imposed so that we might get through this rather significant agenda of the day.

At this point I will recognize Doris Meissner, the Acting Commissioner of the Immigration and Naturalization Service, who is accompanied today by David Hiller, a special assistant to our Attorney General.

The other members of the panel include: Mr. Malcolm Lovell, Undersecretary of the Department of Labor, and Ambassador Diego Asencio, Assistant Secretary for Consular Affairs of the Department of State.

So if you will please proceed. Certainly we are eager to hear your testimony.

STATEMENT OF DORIS MEISSNER, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY DAVID HILLER, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL

Ms. MEISSNER. Thank you, Mr. Chairman.

I am pleased today to appear to discuss the enforcement activities of the Immigration and Naturalization Service and the administration's employer sanction proposal. The committee has a full statement from the Department of Justice. I will excerpt from it at this time.

In his statement before this subcommittee on July 30, 1981, the Attorney General placed in clear focus the need for immediately overhauling and strengthening this Nation's immigration laws. The Immigration and Naturalization Service of the Department of Justice is charged with enforcement of the Immigration and Nationality Act, which includes the control of illegal aliens seeking to enter or presently residing in the United States.

Over the past several years the policies of INS have consistently been to locate, apprehend, and remove illegal aliens employed in this country. Emphasis is placed on aliens in jobs which would be attractive to U.S. citizens and lawful permanent resident aliens.

The Department of Justice has long recognized the futility of attempting to intercept all illegal aliens at the border, thus depending solely on border interdiction as an effective deterrent. The borders are simply too extensive to seal effectively, and border patrol resources are stretched to the fullest.

In addition to its border interdiction efforts, therefore, INS has gradually expanded an interior enforcement program to identify and remove at least a portion of the illegal aliens who have successfully found employment in the population centers of the United States.

Thus, INS investigators are assigned to large metropolitan areas where concentrations of illegal aliens are known to live or work. Many aliens apprehended in the interior are employed in well-paying jobs attractive to U.S. citizens and legal permanent residents.

For example, in Denver within the last 2 months employment referrals by INS officers to the State of Colorado Department of Labor resulted in placing 36 unemployed citizens and permanent resident aliens into jobs paying between $5 and $14 per hour. Since January 1981 approximately 145 places of employment have been referred to the State of Illinois Department of Labor for recruitment subsequent to Service enforcement efforts.

These referrals represent more than 500 employment vacancies which have been made available to unemployed citizens and resident aliens.

Although the removal of 143,000 illegal aliens from the interior represents a significant number of successful investigations, INS is the first to realize the limitations of its present interior enforcement program. While the investigative resources of the INS are carefully targeted to achieve maximum impact, additional mechanisms are needed to deter employment of illegal aliens that will be both more effective and more economical to utilize.

Without an enforcement tool to make the hiring of illegal aliens unprofitable, INS efforts to prevent the participation of illegal aliens in the labor market will continue to realize, at best, only limited success and, at worst, failure to keep pace with the growing numbers of illegals in the workplace.

It is arguable that the absence of a law for instituting sanctions against employers who hire aliens unauthorized to work in the United States serves as an enticement to foreign workers. Today, even if an employer is found to be employing illegal aliens, the penalty is merely a temporary interruption of the production schedule, and the cost and inconvenience of finding and training replacements.

The employer is also free to hire still more illegal aliens with impunity. And even where the Service has successfully targeted its resources and apprehended numbers of illegal aliens in the workplace, it is largely powerless to interrupt the flow, to take steps to turn off the spigot controlled by the unscrupulous or uncooperative employer.

Since most illegal aliens come to the United States to work, the most effective enforcement measures are those that require all prospective employees to demonstrate eligibility to work in the United States, while simultaneously placing responsibilities on prospective employers to assure that persons who are hired are in fact legally authorized to work.

Increasing current enforcement efforts will not in itself deter the growing number of illegal aliens who seek work in the United States. The Department of Justice believes that many employers hire illegal aliens because they are aware that there is no law that makes such practices illegal.

With an employer sanctions law, we believe most employers, as generally law-abiding citizens, will uphold the law. As many as 75 percent of employers in the United States will voluntarily comply with the law and will refuse to knowingly hire illegal aliens.

We base this belief largely on the spirit of voluntary cooperation the Immigration and Naturalization Service has exerienced with employers in various parts of the country in conjunction with a pilot program known as operation cooperation. Operation cooperation was conceived and implemented in the Denver district office in 1975. Los Angeles then implemented the program and has continued it since.

The plan consists of obtaining an agreement from company management to conduct a survey of its employees and, after the survey, assisting management in replacing the employees who were found to be illegal aliens with other workers who pass an INS record check. At present, Los Angeles has 27 companies participating in this program. In Denver, 33 companies are participating.

The program is most effective among production-type businesses where a semiskill is required. Service-type businesses, hotels and restaurants or any nonskill employment require greater efforts to maintain a successful program.

The ability of INS to make regular contact with participating companies and to respond immediately to requests for screening of job applicants inevitably assures effective screening and positive results. With employer sanctions, interior enforcement efforts of the

INS would be shifted from the present tactic of attempting to locate illegal aliens at any and all sources of employment. Instead, INS would identify those employers with four or more employees who knowingly hire illegal aliens and gather evidence of patterns and practices of hiring such aliens to support imposition of fines, civil penalties, or injunctive relief.

An employer, of course, under the sanctions program, as presently proposed, would be entitled to defend any charge of hiring an illegal alien by proving that a prospective employee's documentation of a legal right to work was seen prior to employment. Undoubtedly, there will be a significant increase in the use of fraudulent documentation by illegal aliens and those who obtain employment for them to establish employment eligibility.

Likewise, proof that the employer had seen documentation asserting U.S. citizenship, legal permanent residence, or that an alien who had authorization to accept employment would obviously also be a defense available to an employer. Implementation of the law is not designed to be and will not be antiemployer. Enforcement of the law will be aimed at that element of employers suspected on reasonable grounds of not being in compliance.

The objective of the Department of Justice is to create a program that encourages voluntary compliance. The INS will use trade journals to inform businessmen of this program in enforcing employer sanctions and to elicit their understanding and support.

An important aspect of the program which will be clearly conveyed to employers and to the public at large is the fact that the sanctions cannot be used to justify or to result in discriminatory hiring practices against any ethnic group of U.S. citizens, lawful permanent residents, or aliens otherwise authorized to accept employment, and that allegations of such discrimination will be referred for investigation to appropriate Federal, State, and local civil rights agencies.

Unlike a number of State statutes concerning employer sanctions, the Federal law relative to the knowing hiring of illegal aliens will not require employers to make judgments concerning the authenticity of documentation presented by applicants to establish their employment eligibility.

Employers would be charged with knowing violations of the law under the following circumstances: Where illegal aliens were apprehended in his employ when an employer has made no effort to determine eligibility and has not required employees to execute the employment eligibility form.

Second, when an employer rehires an illegal who was previously apprehended at his worksite and removed from the country by the INS.

Third, when there is clear evidence that an employer has conspired with employees to fraudulently execute the employment eligibility forms; that is, when affidavits from apprehended aliens state that the employer either provided them with fraudulent documentation or indicated how they could secure such documentation to be used in satisfying the eligibility requirements.

In addition, there is the whole subject of the security of identification. As that is the subject of Friday's hearing, I will reserve further comment on that issue until that time.

Senator **Simpson**. Thank you very much, Ms. Meissner. I appreciate that. And again, always in chairing such hearings, I regret to have to inform all that we do have these time problems in order to stay within the time limitation.

[The prepared statement of Ms. Meissner follows:]

PREPARED STATEMENT OF DORIS MEISSNER

EFFORTS BY THE IMMIGRATION AND NATURALIZATION SERVICE IN ENFORCING THE LAWS PROHIBITING ILLEGAL ALIENS FROM OBTAINING EMPLOYMENT

- THE NEED FOR EMPLOYER SANCTIONS -

INTRODUCTION

In his statement before this Subcommittee on July 30, 1981, the Attorney General placed in clear focus the need for immediately overhauling and strengthening this Nation's immigration laws:

> "No great nation -- and especially a great democratic nation -- can long countenance ineffective and unenforced laws. That is especially true when the unsettling results are so apparent to our people.
>
> We must more effectively deter illegal immigration to the United States -- whether across our expansive borders or by sea. The proposals announced by the President would have that result. They represent a comprehensive and integrated approach. They recognize the realities we face and the fact that no policy will be enforceable if it ignores the true facts. Those basic facts are:
>
> -- the presence of from three to six million illegal aliens in this country; and
>
> -- the continuing growth of their numbers by from one quarter to one half million each year.
>
> The overriding purpose of the President's proposals is to make our laws and policies more realistic -- and then to enforce those laws effectively."

INTERIOR ENFORCEMENT

The Immigration and Naturalization Service of the Department of Justice is charged with the enforcement of the Immigration and Nationality Act which includes the control of illegal aliens seeking to enter or presently residing in the United States. Over the past several years, the policy of INS has consistently been to locate, apprehend, and remove illegal aliens employed in this country. Emphasis is placed on aliens in jobs which would be attractive to unemployed United States citizens and lawful permanent resident aliens.

The Department of Justice has long recognized the futility of attempting to intercept all illegal aliens at the border, thus depending solely on border interdiction as an effective deterrent. The borders are simply too extensive to seal effectively and Border Patrol resources are stretched to the fullest. In addition to its border interdiction efforts, therefore, the INS has gradually expanded an interior enforcement program to identify and remove at least a portion of the illegal aliens who have successfully found employment in the population centers of the United States. Thus, INS investigators are assigned to large metropolitan areas where concentrations of illegal aliens are known to live and work. In 1980 alone, INS investigators located over 143,000 illegal aliens in the interior of the country, 46% of whom are employed at the time of their arrest. Significant numbers were apprehended in Boston, Newark, New York City, Chicago, Dallas, Miami, Houston, Los Angeles, San Francisco and Las Vegas, to name only a few.

Aliens apprehended in the interior are employed in well paying jobs attractive to U.S. citizens and legal permanent residents. For example, in Denver, within the last two month, employment referrals by INS officers to the State of Colorado Department of Labor (DOL) resulted in placing 36 unemployed citizens and permanent resident aliens into jobs paying between $5.00 and $14.00 per hour.

Since January 1981, approximately 145 places of employment have been referred to the State of Illinois Department of Labor for job placement subsequent to Service enforcement efforts. These referrals represent more than 500 employment vacancies which have been made available to unemployed citizens and resident aliens. These referrals include employers such as the TRW Corporation where 40 aliens were apprehended and MOLON Motors where 79 employed aliens were removed from the workforce.

Although the removal of 143,000 illegal aliens from the interior represents a significant number of successful investigations, the INS is the first to realize the limitations of its present interior enforcement program. While the investigative resources of the INS are carefully targeted to achieve maximum impact. Additional mechanisms are needed to deter employment of illegal aliens that will be both more effective and more economical to utilize. The 1970s fostered increased discussion about the enforcement of our immigration laws against illegal entry. While conventional enforcement resulted in increasing numbers of apprehensions, the estimated number of illegal migrants entering and remaining in the United States also continued to grow.

An effective deterrent has not yet been developed. What has developed is a consensus that a most effective deterrent against illegal immigrants will be employer sanctions/employee eligibility legislation. The arguments for the adoption of such a law are based on the conclusion that as long as no credible deterrent exists, ambitious men and women will spend a lifetime of savings and take great personal risks to find work in the United States. They will lead fugitive lives as an underclass, with negative consequences for American society as a whole. Without the deterrent of an employer sanctions/employee eligibility system, enforcement will rest on inadequate border vigilance and difficult interior apprehensions that are cost-inefficient, impose human hardships, and often do not discourage illegal entry. Without removal of the powerful incentive of jobs for illegal aliens, the United States' back door will remain open as a result of an ambiguous policy which says "yes" in its actions and "no" in its rhetoric.

Without an enforcement tool to make the hiring of illegal aliens unprofitable, INS efforts to prevent the participation of illegal aliens in the labor market will continue to realize, at best, only limited success and, at worst, failure to keep pace with growing numbers of illegals in the workplace. It is arguable that the absence of a law for instituting sanctions against employers who hire aliens unauthorized to work in the United States serves as an enticement to foreign workers. Today even if an employer is found to be employing illegal aliens, the penalty is merely a temporary interruption of the production schedule and the cost and inconvenience of finding and training replacements. The employer is also free to hire still more illegal aliens with impunity. And even where the Service has successfully targeted its resources -- and apprehended a number of illegal aliens in the workplace, it is largely powerless to interrupt the flow -- to take steps to turn off the spigot controlled by the unscrupulous or uncooperative employer.

Employer Sanctions

Since it is believed that most illegal aliens come to the United States to work, the most effective enforcement measures are those that require all prospective employees to demonstrate eligibility to work in the United States, while simultaneously placing certain responsibilities on prospective employers to ensure that persons who are hired are in fact legally authorized to work. Increasing current enforcement efforts will not, in itself, deter the growing number of illegal aliens who seek work in the United States.

The Department of Justice believes that many employers hire illegal aliens because they are aware that there is no law that makes such practices illegal. With an employer sanctions law, the Department of Justice believes that most employers -- as generally law-abiding citizens -- will uphold the law. As many as 75 percent of employers in the United States will voluntarily comply with the law and will refuse to knowingly hire illegal aliens.

The Department of Justice bases its beliefs largely on the spirit of voluntary cooperation it has experienced through its Immigration and Naturalization Service, with employers in various parts of the country in conjunction with a pilot program known as Operation Cooperation.

Operation Cooperation was conceived and implemented in the Denver District Office in 1975. Los Angeles then implemented the program and has continued it since. Basically the plan consists of obtaining an agreement from the company management to conduct a survey of its employees, and after the survey, assisting management in replacing the employees who were found to be illegal aliens with other workers who pass an INS record check. At present Los Angeles has 27 companies participating in this program.

At Denver 33 companies are participating. The program is most effective among production type businesses or where a semi-skill is required. Service type businesses, hotels and restaurants, or any non-skill employment require greater efforts to maintain a successful program. The ability of INS to make regular contact with participating companies and to respond immediately to requests for the screening of job applicants inevitably ensures effective screening and positive results. The companies prefer to have their employees screened by one or two officers in a controlled situation rather than having their entire operation sporadically disrupted by several officers questioning employees at their work stations during a work shift. The participating companies in the Denver area range in size from 100 to 700 employees and are generally production type businesses representing a broad variety of industries.

Some of the participants initiated contact with INS after learning of the program from other participating companies. The companies in the program average less than 1,000 employees with the largest employing approximately 1,700 persons.

Emphasis in the interior enforcement efforts of the INS will be shifted from its present tactic of attempting to locate illegal aliens at any and all sources of employment, to identification of those employers with four or more employees who knowingly hire illegal aliens and to gathering evidence of "patterns or practices" of hiring such aliens to support imposition of fines, civil penalties or injunctive relief.

An employer, of course, under the sanctions program as presently proposed, would be entitled to defend any charge of hiring an illegal alien by proving that a prospective employee's documentation of a legal right to work was seen prior to employment. Undoubtedly there will be a significant increase in the use of fraudulent documentation by illegal aliens and those who obtain employment for them, to establish employment eligibility. Likewise, proof that the employer had seen documentation asserting United States citizenship, legal permanent residence, or that an alien who had authorization to accept employment, would obviously also be a defense available to an employer. Implementation of the law is not designed to be, and will not be, anti-employer. Enforcement of the law will be aimed at that element of employers suspected, on reasonable grounds, of not being in compliance.

The objective of the Department of Justice is to create a program to encourage voluntary compliance. The INS will use trade journals to inform businessmen of its program in enforcing employer sanctions and to elicit their understanding and support. Notices advising the public at large of the provisions of the law and its penalties will be prominently displayed in places such as post offices, federal buildings, and appropriate offices of state and federal agencies who deal frequently with employers such as State Employment Commission Offices, the various divisions of the Department of Labor, and the Department of Agriculture. The Administrator expects to have an operable sanctions program within six months of enactment of the law. During that time, regulations will be published by INS which will explain compliance procedures to both employers and employees for determining eligibility for employment.

An important aspect of the program which will be clearly conveyed to employers and to the public at large is the fact that the sanctions cannot be used to justify or to result in discriminatory hiring practices against any ethnic group of United States citizens, lawful permanent residents, or aliens otherwise authorized to accept employment, and that allegations of such discrimination will be referred for investigation to appropriate federal, state, and local civil rights agencies.

Unlike a number of state statutes concerning employer sanctions, the federal law relative to the knowing hiring of illegal aliens will not require employers to make judgments concerning the authenticity of documentation presented by applicants to establish their employment eligibility.

Employers would be charged with knowing violations of the law in circumstances such as the following:

> Regulations to implement the employer sanctions law will be required to be filled out by employees and employers. Where illegal aliens were apprehended in his employ, when an employer has made no effort to determine eligibility and has not required employees to execute the employment eligibility form.
>
> When an employer rehires an illegal who was previously apprehended at his work site and removed from the country by the INS.
>
> When there is clear evidence that an employer has conspired with employees to fraudulently execute the employment eligibility forms - that is, when affidavits from apprehended aliens state that the employer either provided them with fraudulent documentation or indicated indicated how they could secure such documentation to be used in satisfying the employment eligibility requirements or where such testimony indicates that the employer conspired with a smuggler to provide him with illegal aliens who would have such fraudulent documentation.

In its March 1980, report entitled "Illegal Aliens: Estimating Their Impact on the United States", the General Accounting Office (GAO) commented on the enforcement experience of the eleven states with employer sanction laws as follows:

> Since the States with such laws have had very limited experience implementing them, there is little information on both the process and cost of such enforcement. .... To the best of our knowledge, the remaining States are not planning enforcement of their employer sanctions legislation. The reasons vary: the illegal alien problem is not significant in those States; prosecution is up to the local officials; additional funds have not been allocated; and/or the States are awaiting pending Federal legislation.

COOPERATION WITH OTHER AGENCIES

Department of Health and Human Services

The Department of Justice recognizes the likihood that with employer sanctions there will be a significant increase in the use of fraudulent documentation by illegal aliens and by those who obtain employ-documentation by illegal aliens and by those who obtain employment for them, to assert their legal right to employment.

The sanctions plan provides that the documentation that would serve to establish a lawful right to employment will be designated by the Attorney General in regulations, and that the Social Security card will be one of the authorized identification documents.

Beginning in early 1982, the SSA expects to issue social security numbers with a legend that distinguishes between numbers that are issued for work purposes and other numbers that are issued solely for non-work purposes, such as the opening of a bank account. Requests for duplicate cards for non-work purposes will also be issued with the new non-work legend. This should reduce the use of valid social security numbers issued for non-work purposes as the basis for work eligibility.

Reissuing the Social Security card would not correct the underlying conditions contributing to social security number and card misuse. For instance, it would not prevent individuals from obtaining social security numbers using false identity documents, or from using someone else's number and card. Furthermore, neither the Social Security Administration (SSA) nor other public or private entities would benefit appreciably from such reissuance. Thus, even GAO questions whether the cost of reissuing the cards, which would be at least $850 million and could be as much as $2 billion, is justifiable.

The INS and the SSA are currently engaged in a program that will improve Social Security personnel's capability for screening out illegal aliens who attempt to secure a Social Security number. While the two agencies have shared information in the past regarding fraudulent applicants, the present efforts are geared towards in-service training for Social Security intake clerks and close cooperation regarding suspect fraudulent documentation.

Since 1978, the SSA has followed regulation which require applicants for new or replacement cards to establish their identification with acceptable identifiers such as a drivers license with a photograph. In addition people age 18 or over applying for new social security cards must be interviewed, in person, at Social Security offices. Inquiries are made of the INS regarding certain applicants and documentation presented. The INS provides evaluation of questionable documentation and also responds to inquiries concerning the validity of alien "green card" numbers and identities. The INS in return advises the SSA concerning apprehended aliens for whom there is evidence of Social Security card use or misuse.

The limited capability of Social Security employees themselves to identify fraudulent documentation is being addressed by the SSA with INS cooperation. An educational package has been prepared consisting of examples of critical elements to be focused on in identifying fraudulent documents and videotape giving further guidance and procudures regarding screening applicants and their documents. These materials should be in the hands of Social Security employees by the beginning of calendar year 1982.

The Department of Justice will continue to work to improve the existing system of identification. We will remain receptive to improvements and innovations which appear to be both workable and cost-effective. We will continue to work with the Congress on means of improving the current system of documentation which are not cost-prohibitive.

CONCLUSION

The availability of employment in this country at relatively high wages without regard to legal status will continue to "pull" illegal migration. Efforts to deter entry of illegal aliens without elimination of the "pull" effect of high wages is only of minimum value. The border cannot be sealed. Efforts to apprehend deport aliens in the interior is a costly and, at best, partially effective. The only credible enforcement measure remaining is a prohibition on hiring illegal aliens. Civil fines of $500 to $1,000 will be assessed for each illegal alien hired. Injunctions will be sought against employers who follow a "pattern or practice" of hiring illegal aliens. Employment opportunities now being filled by illegal aliens will be freed up. In addition, future illegal entry into this country would be deterred. This deterrence would result from the knowledge that the illegal alien would not be able to secure employment after entry has been made, thus eliminating the primary reason for attempting to enter the United States illegally.

Both the Select Commission on Immigration and Refugee Policy and the Reagan Administration, after carefully reviewing the alternatives available, have come to the conclusion that an employer sanctions law will provide an effective enforcement deterrent entry of illegal aliens into the United States in search of employment.

Senator SIMPSON. I might mention as an administrative detail, we will get some of these tables out of here later this morning when we conclude the morning session, and there will be adequate room for the public. We will just remove some of these. These are quite unnecessary.

So, Mr. Lovell, please.

STATEMENT OF MALCOLM LOVELL, JR., UNDER SECRETARY, U.S. DEPARTMENT OF LABOR

Mr. LOVELL. I would like to ask what the time limitation is so that I can be sure to make it.

Senator SIMPSON. The correspondence that went out under my signature said 5 minutes. And I would appreciate that very much.

Mr. LOVELL. I will do what I hope is expert skimming here.

Senator SIMPSON. We will appreciate that.

Mr. LOVELL. I do appreciate the opportunity to appear before you to discuss the need for employer sanctions and the employer sanction component of the administration's proposed immigration and refugee policy reform package.

Information about the underground flow of people across our border is unfortunately far from complete, leaving room for considerable controversy about its specific characteristics and its ultimate causes and consequences among a wide range of affected interest groups and interested scholars.

Nevertheless, despite these debates, there is considerable and, I think, universal consensus that this flow of aliens into the United States is principally a labor market phenomenon. That is, I believe we would all agree that illegal immigration is primarily a movement of workers who are pushed out of their Third World countries and pulled into our labor market by the strong disparities between the wages and employment opportunities in their developing economies and those available here.

One of the keys to addressing the problem of illegal immigration has long been known and long been recommended. Since illegal immigration is largely the result of the availability of U.S. jobs, an effective and practical way of regaining control of our borders is by reducing the opportunity for foreign nationals to enter into our labor market.

Employer sanctions, legislation proscribing the knowing employment of aliens without work authorization, has therefore been singled out as an effective means of reducing illegal immigration since 1951, when the Truman Commission on Migratory Labor recommended sanctions to stop the first large-scale movement of undocumented workers across the United States-Mexico border.

Attempts to include employer sanctions in the 1952 Immigation and Nationality Act failed, however. Illegal immigration across our southern bordern increased steadily until operation wetback, when the Immigration and Naturalization Service repatriated some 2 million illegals in 1953 and 1954 during the midst of the bracero program.

During the last decade a second, even larger scale influx of non-Mexican as well as Mexican undocumented workers became apparent on the east coast and Midwest as well as the Southwest. And legislation establishing penalties for the employment of illegal aliens passed the House during the 92d and 93d Congresses and was recommended by the Nixon administration's 1973 Cramton report, by the Ford administration's 1976 Domestic Council Committee on Illegal Aliens report, by the Carter administration's 1977 Alien Employment Act, and by the 1980 bipartisan Select Commission on Immigration and Refugee Policy report.

Despite this now 30-year-old series of recommendations and strong public support for legislation to prohibit the employment of illegal aliens, employer sanctions have still failed to achieve enactment. However, as the Attorney General stated in his July 30 testimony, the Reagan administration is determined to regain control of our borders and to work closely with the Congress to enact into law an immigration reform program that is fair, effective, and humane.

This administration has therefore undertaken a comprehensive review of U.S. immigration and refugee policies and practices, and we are submitting a legislative package that, in the words of the President: "is designed to preserve our tradition of accepting foreigners to our shores but to accept them in a controlled and orderly fashion.'

A cornerstone of the proposals to curtail illegal immigration is legislation prohibiting employers of four or more employees from knowingly hiring illegal aliens.

And I think I will stop there, Mr. Chairman, and be available for questions later.

Senator SIMPSON. Thank you very much, Mr. Lovell.

[The prepared statement of Mr. Lovell follows:]

PREPARED STATEMENT OF MALCOLM LOVELL, JR.

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you to discuss the general need for employer sanctions and the employer sanctions component of the Administration's proposed immigration and refugee policy reform package.

As we are all now well aware, the magnitude of illegal immigration to the United States has increased substantially during the last decade--in terms of sheer numbers, in terms of illegals' countries of origin, and in terms of their specific area of destination, type of U.S. job, and length of residence here.

Information about this underground flow of people across our border is unfortunately far from complete, leaving room for considerable controversy about its specific characteristics and its ultimate causes and consequences among the wide range of affected interest groups and interested scholars.

Nevertheless, despite those debates, there is also considerable--indeed, I think, universal--consensus that this flow of aliens into the United States is principally a labor-market phenomenon. That is, I believe that we all agree that illegal immigration is primarily a movement of workers--workers who are pushed out of their Third World countries and pulled into our labor market by the strong disparities between the wages and employment opportunities available in their developing economies and those available here.

In addition, I believe we must also agree that, given current demographic and economic global conditions, and the self-reinforcing character of all migrations, this flow of undocumented workers into the United States will not just continue, but will continue to grow and to take root here, unless we take long-neglected measures to curb it.

One of the keys to addressing the problem of illegal immigration has long been known and long been recommended. Since illegal immigration is largely the result of the availability of U.S. jobs, an effective and practical way of re-gaining control over our borders is by reducing the opportunity for foreign nationals to enter into our labor market. Only when we focus on, and take measure to counteract, the economic magnet of employment in a U.S. job will we be able to:

- end the increasing erosion of the integrity of our immigration laws;
- protect the earnings and job opportunities of our most vulnerable workers, with whom illegals compete--low skilled U.S. blacks, Hispanics, Asian, teenagers, women who head households, the handicapped, and legal immigrants and refugees; and
- reduce the anti-alien feelings and the ethnic and social tensions that have been evoked by public fears that we have lost control over our borders.

Employer sanctions--legislation proscribing the knowing employment of aliens without work authorization--have therefore been singled out as an effective means of reducing illegal immigration since 1951, when the Truman Commission on Migratory Labor recommended sanctions to stop the first large-scale movement of undocumented workers across the U.S.-Mexico border. Attempts to include employer sanctions in the 1952 Immigration and Nationality Act failed, however, and illegal immigration across our southern border increased steadily, until "Operation Wetback," when the Immigration and Nationalization Service (INS) repatriated some 2 million illegals in 1953-54, during the midst of the bracero program.

During the last decade, as a second even larger-scale influx of non-Mexican as well as Mexican undocumented workers became apparent on the East Coast and Mid-West as well as in the Southwest, legislation establishing penalties for the employment of illegal aliens passed the House during the 92nd and 93rd Congresses and was recommended by the Nixon Administration's 1973 Cramton Report, by the Ford Administration's 1976 Domestic Council Committee on Illegal Aliens Report, by the Carter Administration's 1977 Alien Employment Act, and by the 1980 bipartisan Select Commission on Immigration and Refugee Policy Report.

Despite this now 30-year-old series of recommendations and strong public support for legislation to prohibit the employment of illegal aliens, employer sanctions have still failed to achieve enactment. However, as the Attorney General stated in his July 30 testimony, the Reagan Administration is determined to re-gain control of our borders and to work closely with the Congress to enact into law an immigration reform program that is fair, effective, and humane. This Administration has therefore undertaken a comprehensive review of U.S. immigration and refugee policies and practices and we are submitting a legislative package that, in the words of the President, is "designed to preserve our tradition of accepting foreigners to our shores, but to accept them in a controlled and orderly fashion."

A cornerstone of the proposals to curtail illegal immigration is legislation prohibiting employers of four or more employees from knowingly hiring illegal aliens.

The Department of Labor believes that the enactment of employer sanctions will itself serve as a significant deterrent to illegal immigration, in part because enactment of such a law sends a message out to the world that a conspicuous loophole in our immigration laws has finally been closed.

We therefore expect substantial voluntary compliance by employers, and we believe that the requirement that employers check the work eligibility of all job applicants by Government determined methods will significantly reduce the number of illegal aliens seeking employment here.

In addition, the Department believes that employer sanctions legislation will provide the Government with the enforcement tool that it needs to end the exploitative practices of those employers who knowingly hire illegal aliens. Without employer sanctions, such employers have been free to hire illegals, to pay them less than prevailing wages for long hours of work, to subject them to unsafe working or housing conditions, and to fire them at will, sometimes by notifying INS of their presence when their work was done and their paychecks were due. Under current law, such employers have at most temporarily lost their undocumented workers to INS or were required by the Department of Labor to pay them back wages if their earnings were below the legal minimum.

With employer sanctions, however, the Government will be able for the first time to penalize employers who engage in such practices, and to protect other employers from this unfair competitive advantage. As the Department of Justice has just testified, under the Administration's proposal, civil fines of $500 to $1000 would be assessed for each illegal alien hired and employers who engage in a "pattern or practice" of employing illegal aliens would be subject to injunctions.

The details of the assignment of functions to the Departments and how they will mesh together have not been finalized. Regardless of how the specific functions are ultimately allocated, however, there is a general process which the Government will go through to enforce the employer sanctions. If I may, I would like to describe this process.

The Administration's employer sanctions legislation contemplates that, prior to hiring a worker, the employer will review Government-prescribed documents which identify the job applicant and attest to the authority of the applicant to work in the U.S. Employers will note which documents were reviewed on a special form prescribed and furnished by the Government. The form will require the signature of both the employee and the employer attesting to the submittal and review of the documents. This form will be retained by the employer.

The first step in the employer sanction enforcement process will involve a check of that form by Government compliance personnel to determine if it is complete and whether anything on its face indicates that an employee might be an illegal alien. If an employer were to refuse to give the Government access to these forms, an administrative subpoena could be issued. If the Government finds that a form is missing or incomplete, or that a form gives rise to a suspicion of the employment of an illegal alien, the Government will then conduct a more in-depth investigation, which would include employer and employee interviews and examination of other corroborating documents, to determine the status of the employee.

If the interviews and further investigative activity indicate the presence of an illegal alien, the Government will then pursue enforcement of the employer sanctions through the assessment of fines against the employer and, in the case of an employer engaged in a "pattern or practice" of hiring illegal aliens, injunctive action through the U.S. district courts. An employer who is issued a notice of intent to fine by the Government will have an opportunity to request an agency hearing. If the employer is still not satisfied with the Government's decision after the agency hearing, the employer may seek review of the decision in the U.S. district courts. The Government will be able to enforce payment of fines through action in the U.S. district courts and all fines will be paid into the U.S. Treasury.

In addition to enforcing employer sanctions, the President's program for addressing the undocumented worker problem calls for increased enforcement of existing fair labor standards laws by the Department of Labor. These increased fair labor standards enforcement efforts by the Department of Labor are intended to complement employer sanctions by removing the economic benefits which accrue to employers from employing illegal aliens under substandard working conditions. It is anticipated that additional resources will be requested for this purpose.

In sum, we believe that employer sanctions, coupled with increased fair labor standards enforcement, will discourage employers from hiring illegal aliens and reduce the demand coming from this country for undocumented workers. This, in turn, should significantly reduce the number of aliens arriving in search of unauthorized employment opportunities in this country.

This concludes my prepared statement. I would be glad to answer any questions you may have.

Senator SIMPSON. And now, Ambassador Asencio, we are very pleased to hear your remarks.

STATEMENT OF HON. DIEGO C. ASENCIO, ASSISTANT SECRETARY FOR CONSULAR AFFAIRS, U.S. DEPARTMENT OF STATE

Ambassador ASENCIO. Yes, Mr. Chairman. I will also summarize.

We are convinced that the Department of State, Mr. Chairman, and I think, paraphrasing something you said, that the employer sanctions proposal is the heart of the resolution of the illegal alien question and I think is the only way that this problem will come under control.

From a foreign relations point of view, the alternatives to sanctions are just completely inconceivable. Either massive border controls or massive deportations would impact on trade and legitimate travel to such an extent and would embroil us in such controversy with our neighbors that it would be unthinkable.

There is also the aspect that we are convinced that they would not be particularly practical, because the resources that would have to be devoted to this make it problematical as to whether we would succeed even if we had a completely open-ended resource picture.

Above all, we consider that it would be damaging to our own heritage and self-esteem. There are a number of other considerations. We think that the primary reliance, for instance, on border controls affects primarily neighbors or near neighbors. And as you mentioned, Mr. Chairman, we are also talking about visa abusers from other parts of the world. So that, in effect, would not resolve the problem.

There is another aspect that we have to consider. That is that most other industrialized nations, and paticularly Western Europe, already have internal controls over employment of aliens. What we are really talking about is entering the modern era. We are probably one of the few remaining countries that does not have this type of measure.

There is another aspect I think this committee should address also. That is that our insistence on visitor's visas in the absence of this type of control is an irritant in our relations with any number of countries but particularly Western Europe where this procedure has been waived for a number of years.

And as you know, Mr. Chairman, we have a nonimmigrant visa waiver bill that also attempts to bring this into line with these other countries. And we consider this a complementary approach to the administration's package because this type of internal control on employment would be an additional safeguard that would supplement our current approach of verification of departure. So I think these two approaches are particularly akin.

The other aspect we have to consider is that our consulates in Third World countries are often burdened with substantial numbers of applications which must be severely screened and many refused. This places our officers in our posts in an adversarial position with regard to the local community and the host government.

It would seem to us that this type of internal control would eliminate a substantial drain on consular resources abroad, would accelerate the processing of legitimate travelers, and would eliminate the contentiousness of the present procedures. So we are for it, Mr. Chairman.

[The prepared statement of Ambassador Asencio follows:]

PREPARED STATEMENT OF HON. DIEGO C. ASENCIO

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, IT IS A PLEASURE TO APPEAR HERE TODAY TO NOTE THAT THE QUESTION OF EMPLOYER PENALTIES INVOLVES FOREIGN RELATIONS CONSIDERATIONS AS WELL AS DOMESTIC CONCERNS, AS DO MANY OTHER ASPECTS OF IMMIGRATION POLICY.

I LEAVE TO THE DEPARTMENTS OF JUSTICE AND LABOR THE DOMESTIC ISSUES INVOLVED AND WILL ADDRESS SOLELY THOSE MATTERS REQUIRING THE ATTENTION OF THE DEPARTMENT OF STATE.

THE PROPOSAL THAT EMPLOYERS BE PENALIZED FOR KNOWINGLY EMPLOYING PERSONS NOT AUTHORIZED TO WORK IN THIS COUNTRY IS PROPERLY IDENTIFIED AS AN ENFORCEMENT MEASURE. IT ACKNOWLEDGES THAT WE HAVE A PROBLEM THAT REQUIRES ATTACKING A CENTRAL CAUSE AND NOT A SYMPTOM OF THE PROBLEM.

THEORETICALLY, THIS SEEMINGLY-DOMESTIC ISSUE COULD BE SOLVED BY MASSIVE BORDER CONTROLS OR MASSIVE DEPORTATIONS, BUT NEITHER IS FEASIBLE NOR ADDRESSES THE CAUSE OF ILLEGAL ENTRY AND EACH WOULD HAVE FOREIGN RELATIONS IMPLICATIONS THAT CANNOT BE IGNORED. FROM THE STANDPOINT OF FOREIGN RELATIONS, THE DENIAL OF EMPLOYMENT IS EMINENTLY PREFERABLE TO FENCES OR FORCIBLE EXCLUSION. AS A PRACTICAL MATTER, THE ONLY EFFECTIVE WAY TO DENY EMPLOYMENT IS TO DETER EMPLOYERS FROM HIRING INELIGIBLE PEOPLE.

MY REFERENCE TO FENCES OR FORCIBLE EXCLUSION SHOULD NOT BE MISUNDERSTOOD. I RAISE THE ISSUE NOT WITH REGARD TO ANY SPECIFIC COUNTRY OR REGION BUT IN A MUCH BROADER CONTEXT. THE MORE BASIC ISSUE IS THAT OF OUR IMAGE IN THE ENTIRE WORLD.

NO COUNTRY CAN LEGITIMATELY ARGUE OUR SOVEREIGN RIGHT TO CONTROL OUR BORDERS. I BELIEVE NO ONE HERE WOULD DENY, HOWEVER, THAT AN IMAGE OF THE UNITED STATES AS A BESIEGED FORTRESS IS NOT ONLY CONTRARY TO OUR TRADITIONS BUT WOULD BE VIEWED AS REFLECTING A CERTAIN SENSE OF INSECURITY. SIMILARLY, MASSIVE ROUND-UPS AND DEPORTATIONS WOULD BE AN INJUSTICE TO OUR AMERICAN HERITAGE AND SELF-ESTEEM. NEITHER IS A MESSAGE TO SEND ABROAD.

ON THE OTHER HAND, AN IMAGE OF THE UNITED STATES AS A COUNTRY THAT DEALS FORTHRIGHTLY WITH A PROBLEM WITHIN ITS CONTROL -- NAMELY AN ECONOMIC "PULL" FACTOR THAT DRAWS PEOPLE TO US -- IS ONE OF STRENGTH OF MIND AND WILL. WE BELIEVE THAT IMAGE WILL CONTRIBUTE TO THE EFFECTIVE CONDUCT OF OUR FOREIGN AFFAIRS WHILE ALSO BECOMING PART OF THE SOLUTION TO A MAJOR PROBLEM.

SUCH A POSITIVE IMAGE WOULD BE ENHANCED BY THE EQUITY INVOLVED, FROM TWO PERSPECTIVES. PRIMARY RELIANCE ON BORDER CONTROLS AFFECTS ONLY NEIGHBORS, INCLUDING OF COURSE, THOSE AS RELATIVELY DISTANT AS CENTRAL AMERICA. ELIMINATING ILLEGAL EMPLOYMENT, HOWEVER, WOULD ALSO AFFECT THOSE FROM THE REST OF THE WORLD WHO ABUSE THE VISA PROCESS BY WORKING IN VIOLATION OF THEIR STATUS. THE MOST CURSORY EXAMINATION OF INS STATISTICS SHOWS HOW RELATIVELY FEW VISA ABUSERS ARE FOUND AND DEPORTED AS COMPARED WITH THE NUMBER OF PEOPLE CAUGHT AND PREVENTED FROM SNEAKING ACROSS THE BORDER. LEGISLATION TO FORECLOSE AGAINST THE EMPLOYMENT OF ANY ILLEGAL ALIEN, REGARDLESS OF HOW HE GOT HERE, WOULD RESULT IN MORE BALANCED ENFORCEMENT OF OUR LAWS AND PRINCIPLES.

THERE IS ANOTHER QUESTION OF FAIRNESS INVOLVED HERE -- THE ILLEGAL WORKER IS NOW PENALIZED BY BEING DEPORTED BUT NO PENALTY IS LEVIED ON THE PERSON WHO CREATED THAT CIRCUMSTANCE, NAMELY THE PERSON WHO HIRED HIM.

"FAIRNESS" IS ALSO AN ATTRIBUTE WE HAVE TRADITIONALLY SOUGHT TO PROJECT AND PROTECT FOR BOTH DOMESTIC AND FOREIGN POLICY REASONS. WE THUS BELIEVE THIS ASPECT OF OUR IMAGE ABROAD WOULD BE HEIGHTENED BY THIS MEASURE.

ANOTHER POINT RELATES PARTICULARLY TO OUR FRIENDS IN WESTERN EUROPE AND OTHER INDUSTRIALIZED NATIONS. MOST, IF NOT ALL, OF THESE COUNTRIES HAVE SOME FORM OF INTERNAL CONTROLS OVER THE EMPLOYMENT OF ALIENS. THUS, MANY OF THEM FIND NO NEED TO REQUIRE VISAS OF AMERICAN OR OTHER TOURISTS. OUR LACK OF ANY INTERNAL CONTROLS HAS LONG MYSTIFIED OUR FRIENDS, FOR THEY CONSIDER SUCH CONTROLS BOTH NECESSARY AND IN KEEPING WITH THE FREE TRADITIONS WE ALL SHARE. ENACTMENT OF EMPLOYER PENALTY LEGISLATION WOULD THEREFORE BE VIEWED BY OUR FRIENDS AS AN INDICATION THAT THIS COUNTRY IS MOVING TO BRING OUR IMMIGRATION SYSTEM INTO THE MODERN ERA.

MOREOVER, OUR INSISTENCE ON THE NEED FOR VISITOR VISAS BECAUSE OF THE ABSENCE OF SUCH CONTROLS HAS LONG BEEN AN IRRITANT IN OUR RELATIONS WITH WESTERN EUROPEAN AND OTHER COUNTRIES. IT SHOULD BE NOTED IN THIS CONTEXT THAT THIS ADMINISTRATION IS ALSO PROPOSING THAT THE VISITOR VISA REQUIREMENT BE WAIVED FOR SHORT-TERM VISITORS FROM SELECTED COUNTRIES -- MOST OF THEM CLOSE FRIENDS WITH COMPATIBLE TRADITIONS OF POLITICAL FREEDOM.

THAT PROPOSAL IS ENTIRELY INDEPENDENT OF THE PRESIDENT'S PROGRAM FOR CONTROLLING ILLEGAL IMMIGRATION AND CONTAINS WITHIN IT SAFEGUARDS WHICH ARE SUFFICIENT TO PREVENT ABUSE OF THE WAIVER. ALTHOUGH A SEPARATE ISSUE, ENACTMENT OF THE ADMINISTRATION'S EMPLOYER PENALTY LEGISLATION WOULD NOT ONLY BE CONSISTENT WITH ENACTMENT OF THE WAIVER PROPOSAL BUT WOULD, IN FACT, ADD AN ADDITIONAL SAFEGUARD WHICH SHOULD

REMOVE ALTOGETHER ANY LINGERING DOUBTS CONCERNING THE WISDOM OF THE WAIVER PROPOSAL. THIS WOULD BE ANOTHER FOREIGN RELATIONS BENEFIT OF THE SANCTIONS BILL.

NOT LEAST, ON A BROADER BASIS, ENACTMENT OF EMPLOYER SANCTIONS LEGISLATION COULD HAVE OTHER FOREIGN RELATIONS AS WELL AS ADMINISTRATIVE BENEFITS. AS MATTERS STAND NOW, ONE OF THE MOST TIME-CONSUMING AND CONTENTIOUS AREAS OF VISA OPERATIONS ABROAD RELATES TO VISITOR VISA APPLICATIONS. WE DESIRE, OF COURSE, TO FACILITATE LEGITIMATE TOURISM IN EVERY POSSIBLE WAY. AT THE SAME TIME, THOUGH, WE HAVE A STATUTORY DUTY TO SCREEN OUT AND REFUSE THE APPLICATIONS OF THOSE WHO ARE NOT LEGITIMATE TOURISTS BUT ARE RATHER SEEKING ENTRY IN THE GUISE OF TOURISTS FOR OTHER PURPOSES -- PRIMARILY THOSE MOTIVATED BY THE ATTRACTION OF EMPLOYMENT OPPORTUNITIES.

THE RESULT IS THAT OUR CONSULAR OPERATIONS, PARTICULARLY IN COUNTRIES WITH LOWER STANDARDS OF LIVING THAN THOSE OF THE UNITED STATES, ARE BURDENED WITH SUBSTANTIAL NUMBERS OF APPLICATIONS THAT THE OFFICERS BELIEVE MUST BE REFUSED. THIS CREATES TWO PROBLEMS: IT IS FAR MORE TIME-CONSUMING TO EXPLAIN SUCH REFUSALS THAN TO ISSUE VISAS TO LEGITIMATE TOURISTS; WORSE, IF THE RATE OF VISA REFUSALS IS SIGNIFICANT, THE CONSULAR POST OFTEN FINDS ITSELF IN AN ADVERSARIAL POSITION VIS-A-VIS THE LOCAL COMMUNITY AND HOST GOVERNMENT AUTHORITIES.

AN EMPLOYER SANCTIONS PROGRAM WOULD DO MUCH TO ELIMINATE THESE PROBLEMS. FEW, IF ANY, MODERN COMMUNICATIONS SYSTEMS ARE SO EFFECTIVE AS THE TRADITIONAL "VISA GRAPEVINE" THAT SPREADS THE WORD REGARDING OUR IMMIGRATION PROCEDURES. JUST AS SANCTIONS WOULD BE A DETERRENT AGAINST ILLICIT BORDER CROSSINGS, IT WOULD SOON BECOME KNOWN IN FARTHER REACHES OF THE WORLD THAT OPPORTUNITIES FOR UNAUTHORIZED EMPLOYMENT HAD

BEEN ELIMINATED OR, AT A MINIMUM, SUBSTANTIALLY REDUCED. THUS MANY OF THOSE WHO NOW TRY TO OBTAIN VISAS FOR THIS PURPOSE WOULD GIVE UP THE EFFORT, ALREADY LARGELY FUTILE, BECAUSE EVEN SUCCESS WOULD NO LONGER BE USEFUL. THIS WOULD REDUCE THE BURDEN ON OUR CONSULAR OPERATIONS, ALLOW US TO PROCESS APPLICATIONS BY LEGITIMATE TRAVELLERS MORE EXPEDITIOUSLY AND, PERHAPS MOST IMPORTANT, REMOVE MUCH OF THE CONTENTION, BOTH FOREIGN AND DOMESTIC, WHICH NOW EXISTS AS A RESULT OF THIS PROCESS.

I APPRECIATE THE OPPORTUNITY THE SUBCOMMITTEE HAS GIVEN THE DEPARTMENT TO EXPRESS THE REASONS WE BELIEVE EMPLOYER SANCTIONS LEGISLATION WILL BE BENEFICIAL FROM THE STANDPOINT OF FOREIGN RELATIONS.

Senator SIMPSON. Thank you very much. That was well under your deadline, I might add.

I will direct some of these questions specifically and others I will direct to the panel. Please feel free to respond as you might wish.

Mr. Lovell, some critics of employer sanctions have claimed that increased enforcement of protective labor legislation would be quite enough by itself to control illegal immigration. I would ask you whether you would agree with that and if you could indicate whether you have an estimate as to what portion of illegal aliens work for employers who now violate labor laws.

Mr. LOVELL. I do not have an exact figure, Mr. Chairman. But I clearly feel that the enforcement of existing wage-and-hour laws would not nearly be adequate to cope with the problem of illegal immigrants.

Although there are instances of some individuals that are unauthorized to enter this country working under conditions and wages that are below those called for by U.S. laws, the majority are working in positions that do pay minimum wage, and as has been indicated, some that are paying very high wages indeed.

It would just not begin to deal with the problem that we face with the vast migration of people into this country without documentation.

Senator SIMPSON. Other critics of employer sanctions claim that simply increasing border and interior enforcement would be adequate to control illegal immigration.

What is the view of the panel as to the amount of additional enforcement which would be obtained even if the budget for existing techniques were doubled, or tripled, or even increased tenfold? Would the United States achieve control over its borders even then?

Ms. MEISSNER. It is fair to say that increased border enforcement would certainly bring about some greater deterrence. There is no question that border enforcement is cost effective and is legally probably the most efficient way of deterring illegal immigration.

But there is also no question that one needs to have a variety of ways of dealing with the flow, because the forces that bring about illegal immigration are strong and deep economic pulls. Our view is that you need both strong border and strong interior enforcement, and the tools that we have available to us at the present time to bring about a strong interior enforcement program are simply not sufficient.

Mr. LOVELL. If I may make a comment, too.

Senator SIMPSON. Please.

Mr. LOVELL. I think we have to recognize that probably of all the countries of the world the United States is the most desirable place to work and to live. And that is recognized throughout the world. And yet we are a nation whose immigration controls are probably least effective, where we have the least effective system of maintaining our immigration policy. So we have this tremendous push from the outside to come in, and we have very few constraints to keep people from coming in.

As a matter of fact, we have as a matter of long-established national policy an attitude of looking favorably upon people coming in, in many instances. It just seems to me that you would need two or three Berlin Walls around the whole country to deal effectively with the problem if you deal only at the borders.

Senator SIMPSON. Now, of course, that has been something that we have discussed so thoroughly in the select commission's activities and in the work of this committee. It is more than a national policy of immigration; it is more of a national nostalgia or mystique of immigration that comes from our feelings about the Statute of Liberty and the remarkable praises of Emma Lazarus. Those are the things that are tough to hurdle as we process this.

I have said it before—and I do not say it for high drama, just for truth—that the actual name of the statute in the harbor is "Liberty enlightening the world." It is not "Send us your huddled masses." It would be difficult to enlighten the world if we were truly overwhelmed by illegal immigration and unlimited legal immigration because of the things that you have just stated.

But certainly, is it not odd that we are the most desirable country of access and have the least desirable law? It is extraordinary. And that is what we are trying very diligently to correct here, and, in the House of Representatives under the chairmanship of Ron Mazzoli. They are proceeding with their hearings just as we are here, and, I hope there will be a union of thought. There is, I believe, on most of the issues here.

Mr. Ambassador, I heard you give a little pitch there for your visa waiver bill in the midst of your opening remarks, and I would ask you what percentage of illegal aliens now working in the United States entered the United States legally on temporary visas but then violated the terms of their visas? I realize you cannot give me something precise there, but I think you could give me a hunch, an educated speculation about that. And would employer sanctions make it easier than alternative techniques to apprehend such individuals?

Ambassador ASENCIO. Certainly, Mr. Chairman, there is considerable controversy as to what a reasonable figure would be in this field. And this is both one of the virtues and one of the flaws of dealing in this business. You can make up your own numbers, and they can go in any particular direction depending on your argument.

I have been concerned for some time as to whether visa abusers were a substantial part of the problem, because if they were, if they are, obviously this has to affect our policies abroad.

I conducted a survey, trying to find a statistically significant sample in a variety of posts, those where we have no problems and those where we have high fraud and other problems. And while I would not stake my life on the outcome, at least I think it is indicative.

Basically, we were able to determine for a finite period of time with a significant number of participants that less than 2 percent dropped out of the sample. Now, those were not necessaily visa abusers. These could also be people who adjusted their status or people who for statistically aberrational reasons did not show up. Now, that is less than 2 percent per year.

Depending on when one would consider that the illegal alien problem or visa abuser problem began, the overall number could be substantial or relatively trivial. But a figure of less than 2 percent would indicate to me that the visa abuser is not the majority in the illegal alien problem but is probably at least a significant minority that has to be considered.

But the point that you make about whether there would be a better way of handling this, and also referring to the previous question, one of the things that strikes me is that an impermeable border is not in the national interest, because of its impact on other things; on trade, on legitimate travel. And I think this is one of the things that we have to consider.

We approve of legitimate travel to the United States. We think it is good for our political interests. We think it is good for our economic interests. And certainly, it is good for our balance of payments. And to impact unfavorably on that I think would be unthinkable.

And it would seem to me that if we had a system akin to the Western European system that did not require a visitor's visa, much of the contentiousness of the visa process now would disappear. It would facilitate tremendously the travel of foreigners, legitimate travelers to the United States, and the drain on resources would be minimal. There would be a significant improvement in our resource situation.

Senator SIMPSON. That 2 percent that you addressed, Ambassador Asencio, that is then 2 percent of what we refer to as nonimmigrant visas; is that correct?

Ambassador ASENCIO. That is correct.

Senator SIMPSON. What is the total number of nonimmigrant visas given each year? I would think that would be a rather significant figure.

Ambassador ASENCIO. Right now, Mr. Chairman, it is running at less than 7 million.

Senator SIMPSON. So 2 percent of 7 million is? Somebody, please; that is not my bag.

Ambassador ASENCIO. 140,000.

Senator SIMPSON. 140,000. So that is a significant figure.

Ambassador ASENCIO. Except let me reiterate that this is not 2 percent visa abusers. These are 2 percent of those people within our sample that we were not able to account for for any number of reasons.

Senator SIMPSON. What is the figure, if you could share with the subcommittee, for just plain airline passenger tickets, those that are purchased and then those that we know are not used in return? There are some figures on that, are there not?

Ambassador ASENCIO. I certainly do not have them, Mr. Chairman.

Senator SIMPSON. I thought at one time there were figures with the State Department or the Justice Department, because we were talking at one time in previous discussions about the simplicity of requiring a round-trip ticket to be produced. And the reason for that was because of this aberration in statistics. Do you have that?

Ms. MEISSNER. I am grasping. Ask again exactly what you want?

Senator SIMPSON. The question of how many come here with reservations and airline tickets and then do not return, yet we know that they are here on that type of visa and there is no return. So one of the proposals at an earlier time in these proceedings was the simple—and it was a simple suggestion—of a round-trip ticket being in-pocket. And I was wondering what the figures were that gave rise to that recommendation. I wondered if you recall, anyone on the panel.

Ms. MEISSNER. I do not recall. We would have to go back and check that.

Ambassador ASENCIO. Mr. Chairman, I recall that as part of the nonimmigrant visa waiver approach, we wrote into the proposed legislation that people availing themselves of this proposed privilege would have a round-trip ticket as part of the enforcement compliance portion of the bill. But I do not really recall statistics, as such.

Ms. MEISSNER. Senator, there are a couple of figures that I can give you that may be helpful. We have, as you know, a nonimmigrant system which has some very serious flaws in it that we are in the process of overhauling. But the system does show that 10 percent of the people who come as nonimmigrants do not return. If we issue 7 million nonimmigrant visas a year, for example, then we are talking about 10 percent of that number who, according to our records, remain.

In addition to that, it may be helpful for you to know that about 20 percent of the illegal aliens that we apprehend in the interior of the United States are visa abusers. Now, it is very difficult to extrapolate from that because, as I pointed out in my testimony, we try to target our interior enforcement efforts on higher paying jobs.

Nonetheless, about 20 percent of the people we apprehend fall into the category of people who came with documentation.

Senator SIMPSON. That is very helpful. If 10 percent of the 7 million do not return, well, that figure is certainly a significant one.

Ms. MEISSNER. I think we would have to assume that the large share of those people are working.

Senator SIMPSON. Let me get to a few more specific questions. I will direct those to you, Ms. Meissner. You state that as many as 75 percent of employers in the United States will voluntarily comply with the law and will refuse to knowingly hire illegal aliens. In my view, I think that is a minimum figure for voluntary compliance.

You also indicated in your testimony there will be a "significant increase in the use of fraudulent documentation by illegal aliens." And also that employers will not be required to make judgments concerning the authenticity of documentation presented by applicants to establish their employment eligibility.

How will such a large majority of employers determine whether applicants are illegal?

Ms. MEISSNER. The proposal we are forwarding calls for employers to inquire of all employees some proof of eligibility to work. That proof could come about in two ways: First, by showing an immigration document, a green card in most circumstances; or by showing two types of presently available identifiers, such as a birth certificate, social security card, driver's license, selective service registration, and so forth. Those methods would be specified in the regulations so that they can be changed over time as different systems of identification improve or change.

Senator SIMPSON. Would not most of those illegal aliens be able to obtain jobs from most of those employers simply by presenting fraudulent documents?

Ms. MEISSNER. Yes. As we pointed out, this does encourage people who do not have bona fide documents, to get fraudulent documents. However, we think there are a variety of steps that can be taken to check that trend. The social security system has been improving its documents check for several years, and a number of things are on the horizon that will improve its ability to check issuance of social security cards.

The whole question of documentation is an important law enforcement question, not only for immigration but in a range of other circumstances as well. We would work very carefully with those States where illegal immigration is a large problem to improve their issuance procedures and help them gain better control of birth certificates, registries, and so on.

But absent a secure identification system, I think we must be very honest about the fact that the problem of fraudulent documents is a real problem.

Senator SIMPSON. I appreciate that. That brings to the fore a great deal, that they will just forge those same things again. I have no doubt that that will occur.

I am continually presented with the very clear evidence of just how easy it is to obtain the green card, not just a social security card, but the green card which is available everywhere for a very minimum amount. From the green card legitimate identification cards can be obtained: For social security, unemployment compensation, AFL-CIO, medicare, medicaid, food stamp program.

I have been fascinated at the number of legitimate cards that come from one illegitimate card. And, of course, that in itself, regardless of whether they leave a little on the table, or they do not get their social security back, or they do not get this, or they do not get that, the issue is it diminishes our system when that occurs.

If fraudulent use still went on, I believe that through proper legislation we could correct at least the great percentage that we have now of the presentation of fraudulent documents.

It seems to me that the administration approach would indeed protect employers attempting to comply with the law by providing a screening procedure for them to follow and be secure. But it also seemed that might be accomplished in a way which might eliminate nearly all of the genuine screening effect of the procedures.

Should we not seek to do both: To protect the earnest employer and to do it in a way that would actually have the effect of screening out illegal aliens? Is that not what we should be about?

Mr. HILLER. Mr. Chairman, could I enter the fray on that one?

Senator SIMPSON. Please.

Mr. HILLER. There were no issues, I think it is fair to say, that excited as much interest within the administration as the question of employer sanctions and how those could be workably enforced. The administration, after long deliberation, concluded—and I guess it is your view also—that there is no other credible means we could pursue to curtail illegal immigration apart from a sanction that closes off the opportunity to work here without regard to legal status.

There was no variety of opinion on the question of what sort of identification or eligibility system was required to enforce that scheme. The administration's view is that at this point, as we are first moving into a scheme of employer sanctions, a system of identification based on existing identifiers will screen out an appreciable, a large number—we are uncertain what percentage that would be—but a large number of illegal aliens, recognizing that that system, like any other scheme of identification that would be proposed will be susceptible to some abuse or counterfeiting.

But it is far from clear that that scheme will not work. And before launching into one of a variety of alternative proposals that could call for substantial expenditures that might or might not enhance the security of the overall program, it was felt advisable to proceed on the basis of current forms of identification.

Senator SIMPSON. Let me throw this out. Each of you may respond as you wish. One of the things that is alleged in the discussion of employer sanctions is that, "Well, you know, 12 States have enacted them, yet they are rarely enforced. They do not work. And that is obviously going to happen at the Federal level, too."

In your opinion, why are those laws not being enforced by the States? Do you have any observation on that? And how might we insure that they are enforced if enacted at the Federal level?

Mr. LOVELL. Let me try the second half, because I am not really that familiar with why they are not being carried out in those States. But I think, obviously, it would require a vigorous effort on the part of the Federal establishment to enforce this.

It would require a number of inspections, and it would require a recognition on the part of the employers, particularly those who have been known over the years to use illegals, to alert them that they are going to be subject to fines and that there is a serious intent on the part of the Federal Government to enforce this law.

It will not be enough just to pass the law and then continue with present inspections. It will require a very substantially increased effort to make sure that there is an awareness on the part of all employers of the responsibility they bear in this regard.

Senator SIMPSON. I think that jibes with your testimony that enactment would serve as a significant deterrent to illegal immigration, in part because it would send a message to the world that a conspicuous loophole in our immigration laws has finally been closed.

In your view, why has the sending of such a message not been effective at the State level? Do you have any thought on that?

Mr. LOVELL. Well, I suppose the message at the State level was not believed.

Senator SIMPSON. But that is continually addressed. I think there has been only convictions, with a $100 fine or something of that nature.

There has been no impetus for the States to proceed, especially when you get to consideration of the Texas proviso. Our law now says it is illegal to harbor an illegal alien, and yet provides that employment does not constitute harboring. Well, that is an interesting anomaly, which cannot continue.

Let me ask you, Ambassador Asencio, if I may, has the Government of Mexico indicated to the State Department its position regarding the administration's employer sanctions proposals?

Ambassador ASENCIO. No, sir, it has not.

Senator SIMPSON. Have they expressed formally or informally any concern that a resulting slowdown in the migratory flow of Mexicans to the United States for employment would jeopardize Mexican internal security in any way, or stability, if those people cannot find employment within their own country? Are you aware of any expression like that?

Ambassador ASENCIO. We have had a lot of informal discussion, Mr. Chairman, on that subject. But the signals we get are ambivalent in the sense that it is fairly evident that with regard to the type of Mexican, the undocumented Mexican coming to the United States, a selective process is operating. They are usually the more aggressive, better educated, younger and healthier individuals, many that the Mexican Government would probably prefer would remain within the context of the Mexican economy.

So you have this ambiguity. It is not just the unemployed peasant masses we are talking about. So I am not sure that there is a unified opinion within the Mexican Government as to whether the so-called safety valve is a good thing or not.

Senator SIMPSON. The safety valve theory, you're going to get into that?

Ambassador ASENCIO. I am casting doubts on it, Mr. Chairman.

Senator SIMPSON. OK, I hope you will join us in casting doubts, if you please.

Let me ask you, though, as now we await the transition of government in Mexico and the new designee has been indicated by President Lopez Portillo, do you have any background about the new designee and perhaps any of his views with regard to these issues?

Ambassador ASENCIO. Not specifically, Mr. Chairman. But I personally have always been suspicious of Harvard business graduates.

Senator SIMPSON. Well, we will go on to the next question, just to one more, I think.

I guess I would ask Mr. Lovell. The Farm Labor Contract or Registration Act prohibits the knowing recruitment, employment or utilization of illegal aliens by farm labor contractors. Could you briefly describe the experience to date with that act prohibiting the knowing employment of illegal aliens? How many persons have been arrested, how many prison sentences have there been under that legislation, how is it implemented, what is the Department of Labor's reaction to it?

If you want to present that in writing to me at a later time, please feel to do so.

Mr. LOVELL. I think I would rather do that, Senator, to give you a more accurate portrayal of what our experience under the Farm Labor Contract or Registration Act has been.

I would say that about 50 percent of the violations we have found have been what we consider knowing violations. I think in the past 4 years about 9,300 illegals have been——

Senator SIMPSON. What was that figure?

Mr. LOVELL. About 9,300 undocumented workers have been discovered or have been apprehended in the last 4-year period, 1978, 1979, 1980 and the 9 months of 1981. And about 50 percent of those have been judged to have knowingly employed illegals.

Senator SIMPSON. I would appreciate if you would furnish me the information in response to the remaining parts of that question.

Mr. LOVELL. Certainly the law has been helpful, because without it I think we would find substantially greater numbers of illegals involved in this area. The contractor is one form of employer, as you know. They hire workers and then they subcontract them out to other employers.

And really, what the administration is recommending is the extension of that concept from the contractor to all employers themselves. But we will give you the benefit of our experience in the administration of that act.

[The material referred to follows:]

The Farm Labor Contractor Registration Act, as amended in 1974, provides that farm labor contractors must refrain from knowingly recruiting, employing, or utilizing aliens not lawfully admitted for permanent residence or who have not been authorized by the Attorney General to accept employment. With the 1974 Amendments, the Congress also added authority for civil money penalties to the Act, of up to $1,000 per violation. The Wage and Hour Division usually assesses a civil money penalty of less than $1,000 for a first offense. However, when an undocumented worker has been reemployed after being apprehended and deported, the reemploying farm labor contractor may be assessed a civil money penalty of $1,000 for each such worker. This amount may also be assessed in the case of repeated serious violations.

The following figures summarize the results found in the last five years, fiscal years 1977-1981.

Number of undocumented workers, 10,190.

Number of farm labor contractors having one or more undocumented workers, 370.

Amount assessed aganst farm labor contractors in civil money penalties, 1,407,650.

The true impact of the Act on illegal immigration is difficult to measure because the actual number of undocumented workers in this country is not known. In addition, employment of undocumented workers is not limited to farm labor contractors.

Investigation statistics, however, show that patterns of employment of undocumented workers have not been broken and that substantial numbers of illegal aliens continue to find work with farm labor contractors.

Year:	*Unauthorized aliens*
1981	2,364
1980	3,995
1979	2,243
1978	1,178
1977	410

Criminal cases are prosecuted by the Department of Justice. That agency has indicated that from 1977-1981 six convictions resulted from prosecutions brought under the criminal provisions of the Act. These were not reported with sufficient specificity to know whether illegal aliens were involved.

Senator SIMPSON. I would recognize the ranking minority member of the subcommittee, Senator Kennedy, who has been extremely helpful to me as chairman. It is an area of great interest for him. He chaired the subcommittee for some 15 years. He took it into the full committee chairmanship when he became chairman of the Judiciary Committee. And he and I both served on the Select Commission.

I also will introduce to you Senator Grassley, who is a member of the subcommittee from Iowa. Senator Grassley has been most interested and involved in the subcommittee proceedings.

Senator Schmitt is to come and share with us his testimony. He has not arrived yet, so we will proceed with questioning.

Senator Kennedy, if you have any questions or statements, please feel free to do so.

Senator KENNEDY. Thank you very much, Mr. Chairman. I have a statement which I would like printed in the record.

Senator SIMPSON. Without objection, so ordered.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. During the deliberations of the Select Commission on Immigration and Refugee Policy, there was probably no more divisive issue, nor one that created more controversy and discussion, than the proposal to impose sanctions on employers who knowingly and repeatedly hire undocumented aliens.

The close votes on this question reflect the complexity of this issue. And there remain real questions over the costs and benefits of employer sanctions.

Current sanctions fall solely on the undocumented alien, not on the employers who may be exploiting them. It is argued that the Government should have a tool to deal with the serious problem of exploitation by large-scale employers who engage in a pattern-and-practice hiring of undocumented aliens.

A more appropriate step, however, would be the effective enforcement of exisiting laws. Part of the incentive to hire undocumented aliens is their willingness to accept substandard wages and working conditions. Before moving to employer sanctions, we must intensify the enforcement of existing laws, including the minimum wage, OSHA, the Fair Labor Standards Act, social security insurance, unemployment insurance, and title VII of the Civil Rights Act. Vigorous and effective enforcement of these laws will not only reduce the incentive for employers to hire undocumented workers, but also to protect against their exploitation. It will also protect the American labor market in ways which employer sanctions simply cannot.

Also, I oppose the establishment of a new national employee eligibility card or data-bank system. These sweeping proposals are extremely costly. It is doubtful whether taken alone, that they would substantially stem the flow of illegal aliens. And they present serious threats to privacy and civil liberties. Until these doubts are dispelled, existing identification documents and procedures can and should be used to determine employment eligibility.

Perhaps it is time to make the social security system and card less susceptible to misuse so that it can be used as an effective fraud-proof form of employee identification. The General Accounting Office has recently recommended that the social security card needs to be strengthened to protect the integrity of the social security itself. Over a reasonable period of time we should take the necessary steps to protect the social security number and establish penalties for its fraudulent use. This will benefit the social security system. It will also avoid the need for lauching a costly, new identification system for employment eligibility purposes.

Again, the issue of employer sanctions is complex and the tradeoffs are difficult. So I welcome this hearing and I commend the chairman for pursuing these tough issues in a thorough and comprehensive manner, hearing all sides.

Senator KENNEDY. I apologize to the witnesses that I was unable to be here earlier for their testimony. But I would be interested if I could, Mr. Chairman, to inquire of them about some of the matters which I think they must have given some consideration to and which I would like to hear them out on.

We are attempting to make some policy decisions and also to respond to some concerns of our colleagues on the Judiciary Committee in the Senate, and one of the points which have been raised by many of those who are concerned about employer sanctions is that this is going to be a way in which employers can effectively discriminate against Hispanics or foreign-looking individuals, and that they will—rather than risk prosecution under the law—that they would not hire those individuals who they think may put them at risk, and this could effectively discriminate against citizens of this country.

You refer I think in your testimony, I guess on page 8, at the bottom of page 8, you talk a bit about this particular problem. But what specific steps are you going to take to try to deal with this problem, the potential for discrimination?

Particularly, I might say as one who has been sitting in on a variety of hearings and witnessed the administration, on issue after issue, backed off in support of enforcement, whether it has been OSHA or whether it has been the Office of Contract Compliance or whether it has been discrimination against women.

It seems to me on the one hand you may very well be urging us to pass into law some kind of criterion and then not enforcing it and permitting that particular provision to be used as a factor of discrimination. I would like to hear you out on that.

Maybe the first point I would be interested in is how you are going to deal effectively with the potential for in employer sanctions.

Mr. LOVELL. Senator, first of all I would like to say that we are concerned about that. Certainly it is not the intention of this legislation to encourage discrimination. As a matter of fact, I think it is to the contrary.

Today we have probably the worst potential for discrimination in the employment of illegal immigrants in this country. They are frequently concerned that if they protest a decision of the employer, if they join a union, if they do anything that could conceivably turn the employer against them, that they will be reported to the Immigration Service and be deported.

I think in terms of the human considerations that we have, that the situation where the individual illegal is really deprived the protection of the laws of this country because of their illegal status is a dreadful situation from their point of view.

Now, the two things that are happening in this bill: One of course will be the opportunity for those people illegally in this country to remain, and I understand that is a subject for future hearings. But that certainly is going to relieve this very substantial group. We do not know exactly how much, but probably between 3 to 6 million people will be relieved of the burden that they are currently carrying around with them at the workplace.

So I think that from the point of view of discrimination and the human rights aspect of it, that this law will certainly do far more to protect the human rights of all workers than it will do to cause discrimination.

Now, to address the question in terms of whether employers wish to use this law as the basis of discrimination, of course we would oppose that and we would oppose it very vigorously. If the individual had submitted adequate proof of citizenship or adequate proof of being legitimately in this country and able to work and was turned down, he certainly would be able to file the same kinds of discrimination cases in State or local EEOC offices, and of course our office of—in the case of a Federal contractor, our OFCCP would also be very conscious of that kind of discrimination and would take action against it.

Senator KENNEDY. Well, if there is this exploitation—and I could not agree with you more that there is exploitation—it seems to me that you get caught on the other side of the wicket. Why is the administration cutting back on the enforcement at the present time of various law enforcement agencies and personnel in order to stop the exploitation?

It seems to me that you respond to the question and say on the one hand, well, we have a situation where this is a vast group of individuals, 3 to 6 million, that are being exploited and this is the worst form of human rights violations and we are going to move ahead with both enforcement and also with some kind of amnesty program to regularize their status.

The amnesty program which you have suggested is, as far as I am concerned, far short of the kind of legalization that has been suggested by the Select Commission. But you say, well, they will be regularized and then they will be treated as other citizens and that will eliminate the greatest violations of human rights, so these programs will work along pretty well.

But that is basically on faith, quite frankly, because we see the administration backing off the enforcement and the personnel of all these other enforcement agencies.

Mr. **Lovell**. Senator, I would like to address that question, because I think you are making an assumption that the steps we are taking in the Department of Labor and OFCCP and OSHA represent backing off from our regulatory responsibilities.

Far from the truth. Far from the truth, Senator. You and I might have differences as to how these goals should be achieved, legitimate differences. I think that our predecessors in the Labor Department, if I can try to speak objectively, had greater confidence in throwing large numbers of people and large amounts of money at problems and believing that in that way they would automatically be resolved.

We do not think that is necessarily so. We are going to take substantial budget cuts according to the President's program so that we can have a stronger economy in this country. But I pledge to you, Senator, that it would be my intention to operate these programs in an even more efficient way and move further toward achieving the results than we have in the past years.

Senator **Simpson**. Mr. Lovell, if I may interrupt. We have on the agenda Senator Schmitt, who is here now, and Senator Kennedy has been kind enough to defer. If we could hear the remarks of Senator Schmitt and then if you could remain just for a few moments, Senator Kennedy will finish his inquiry. Then I think Senator Grassley has one question. Is it possible for you to remain? I would appreciate that.

Now I introduce Senator Jack Schmitt, Harrison Schmitt, who has a deep and abiding interest in this issue and who has been most helpful to the subcommittee. Senator Schmitt.

STATEMENT OF HON. HARRISON SCHMITT, U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator **Schmitt**. Mr. Chairman and members of the committee, it is my great pleasure to be with you today. And I am sorry to interrupt the questioning, which I wish I could be here for the whole course of this hearing. As you have indicated, it is one of great interest and has consumed a great deal of my time.

It is a pleasure to appear before the subcommittee as it continues to review and overhaul, hopefully, our Nation's immigration policies. I would also like to commend you, Mr. Chairman, for conducting this hearing on the issue of employer sanctions in a very timely manner as this issue is undoubtedly one of the most controversial proposals forwarded to the subcommittee by the administration.

Being from New Mexico, which shares a 180-mile border with Mexico, it naturally has been one of my priorities to see a practical and fair resolution of the problems associated with undocumented workers and Mexican workers in particular. These aliens are continuing to enter our country in ever-increasing numbers and now account for more than half of all illegal migration to the United States, to the best that we can determine.

No social problem facing the people of this country and the people of Mexico has greater potential significance. It is my view that we must regain control of our borders, but do so without resorting to unenforceable legal restrictions. Doing so will require sweeping changes in our immigration laws as well as our immigration philosophy.

But penalizing employers who knowingly hire illegal aliens, as suggested by the administration, will do more harm than good in my opinion. In my opinion, this proposal will not stop illegal Mexican migration, but it will cause economic chaos for thousands of American businessmen, small businessmen in particular, and will certainly foster continued discrimination against minorities.

Illegal aliens from Mexico come to our country for economic reasons, Mr. Chairman. The vast majority maintain their allegiance to Mexico, not to America. Studies have shown that these migrants return home regularly and permanently after earning enough money to meet the economic crises that brought them north in the first place.

Migrants primarily perform unskilled seasonal labor. They do not displace American youths or minorities or other workers in this country who are looking for work, nor do they cause any documentable unemployment. The vast majority of Americans simply do not want the kind of jobs that Mexican migrants are willing to perform.

In fact, projections through the end of the century indicate that this phenomenon will persist, because there will be fewer Americans entering the labor market. However, millions of these types of jobs will be available, and millions of Mexicans will be seeking higher incomes in times of economic crisis.

If the employer sanction proposal is vigorously pursued, Mr. Chairman, as it must be if it is to work, I fear that many businessmen in my State and elsewhere in the Southwest and almost certainly elsewhere in the country will be forced into bankruptcy because they will not be able to find sufficient American labor willing to take these low-skilled jobs.

Mr. Chairman, as I said before, the issue is not pay for these workers; the issue is the availability of labor. For those employers who can find workers, it is likely that hotel and restaurant costs, manufacturing costs and agricultural costs and many other costs will all soar. In my opinion, neither result is acceptable to the American people.

Holding employers and homeowners liable for hiring the illegal aliens will also increase job discrimination against minorities. Under the administration's proposal, each applicant must present two forms of identification to his prospective employer. An applicant would have to certify in writing that the applicant is here legally. Any employer who is concerned about complying with the law would naturally be suspicious of anyone who might be an undocumented worker, and in the Southwest and other parts of our country that means Americans of Hispanic origin.

Suspicion could easily lead to a situation where many Americans would be denied work simply because they did not look legal. In my opinion this would be a giant step backward for a country that encourages desegregation and acceptance among all races.

The solution to the complicated problem of undocumented workers lies in maintaining a free flow of labor, not in penalizing employers who hire illegal aliens. We must realize that the American economy has been and is greatly benefited by the presence of undocumented workers. Beginning back in the last century, Mr. Chairman, the flow of workers from Mexico has greatly augmented the development of this country, and particularly the Southwestern part of the country.

There has been mutual benefit. Mexico has benefited by the training and skills that these workers receive in this country. We have benefited because labor was available that would otherwise not have been available. Not only are there many small businesses and farms kept afloat by the availability of these willing workers today, but illegal aliens support our tax base by paying income and social security taxes at a much greater rate than they withdraw.

The issue is labor availability, Mr. Chairman. Again, the issue is not the pay that these workers require. There is no reason to believe that our economy would not benefit in the same way if we shifted the status of these workers from illegal to legal by adoption of a temporary guest worker program that meets the need for additional low-skilled labor in this country.

We have a guest worker program today, Mr. Chairman. It just happens to be an illegal one.

As you know, I have introduced a bill, S. 47, the United States-Mexico Good Neighbor Act, which would allow Mexican nationals to legally enter this country for a temporary period of time while they seek employment in fields and locations that do not compete with Americans. Certain safeguards are in the bill to make sure that that in fact does occur.

The number of workers would be determined by the dictates of the demand for labor and not by an arbitrary figure of any kind. Under this program employers would not bear the burden of enforcing our immigration laws, nor will some Americans fall victim to job discrimination.

Obviously a guest worker program of this type is only a short-term solution. We must also encourage the rapid development, the economic development by Mexico and other countries in this hemisphere, so that the pressure which drives illegal aliens north to seek jobs would disappear. However, it is to our advantage to develop a practical policy now to quickly stabilize the situation while we work to develop and implement the long-term solution with our neighbors.

Mr. Chairman, this concludes my statement. Again I thank you for giving me the opportunity to testify this morning, and I would be happy to respond briefly to any questions that you might have.

Senator SIMPSON. Thank you very much, Senator Schmitt. I know that you are chairing a hearing at the present moment in time, so I will come down to your office with my questions.

Senator SCHMITT. Well, I will look forward to once again meeting you in my office and going over these issues.

Senator SIMPSON. I see you did get in a plug for the temporary worker program.

Senator SCHMITT. Somehow I got that in. I appreciate that opportunity.

Senator SIMPSON. At the hearing on that issue we will anticipate your testimony again.

Senator SCHMITT. Mr. Chairman, if I could just say, even though we were jesting here, there is a very direct correlation between the issue you are examining today, employer sanctions, and the question of how to implement an actual guest worker program, also proposed by the administration. Conceptually I think they are on the right track, but in the practical aspects of it I think that they have missed the mark.

Senator KENNEDY. I would like to ask the Senator, in listening to your statement, is it your feeling that any enforcement mechanism which is established, which has for example been suggested by the administration, would result in discrimination against either Hispanic or foreign-born individuals?

Senator SCHMITT. Senator Kennedy, this is not only my judgment, but it is the judgment of most of the Hispanics in New Mexico, where 35 percent of the population is potentially subject to this kind of discrimination. Frankly, I do not think any program that depends on employers or anyone else in large numbers in our economy being the enforcers of the program will work.

I would say the same thing relates in another unrelated issue and that is food stamps. We depend on the clerks at the checkout counter to enforce our food stamp laws. Well, it is not working, obviously, and those that need food stamps are not getting them in many cases, and those that do not are abusing the privilege.

I think the same type of principle would apply here. In addition, when you look at a 2,000 mile border and you are going to try to seal that border off, frankly, Senator, there is no practical way to seal that border. The flow will continue so long as there is demand for labor.

Senator KENNEDY. Let me just ask finally, what is your sense about the amount of exploitation now of the undocumented aliens in terms of payment of minimum wages and other kinds of——

Senator SCHMITT. The evidence I have been able to gather is mixed. In New Mexico it appears that almost all workers are being paid minimum wage or higher. Of course, there is a different cultural environment there. Most of the illegal aliens apparently are being employed by Hispanics, although that is not certainly in every case.

I have heard in other States, in Texas, that there has been some exploitation, and one reason why I believe we should legalize the guest worker program that now exists through a green card program of some kind, a temporary visa program, is to insure that these workers do have the general protection of our labor laws.

And in all of my conversations and all the research that I have had access to, the minimum wage issue is not the principal issue. The principal issue is whether labor is going to be available at the time during the season when labor is required.

Senator SIMPSON. I regret that we are going to have to proceed. We have other witnesses here this morning, and Senator Kennedy, if you have an additional 5 minutes of questioning for this panel, please proceed.

And thank you, Jack.

Senator KENNEDY. Thank you, Mr. Chairman.

I may submit some questions to the administration. But the suggestion that the kinds of protections which should be available to American workers, which have been established in the statutes of this country, are being afforded to the employees in all parts of this country, whether they are undocumented aliens in my own city of Boston or in other areas of this country, I do not think has been adequately documented.

We saw some time ago the Secretary of Labor. for example, being involved in an inspection tour himself in the New York area of "sweat shops." We have seen in the "New York Times" and other newspapers a detailed chronicling of exploitations of undocumented workers where we still have not been able to see the Department of Labor and other enforcement agencies taking the steps to see that those conditions were terminated.

While on the one hand I think it is unfair and unjust just to penalize the undocumented aliens and not make the employers bear some responsibility for violations of the law, I am very much troubled by the suggestion that we enact protections that are in name only, and then in such a way that it is going to encourage discrimination, rather than move in the other direction.

I recognize this is enormously complicated, but I would like to be able to submit some questions.

Senator SIMPSON. Thank you very much.

Senator Grassley had a question, I believe. Senator Grassley?

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Not only a question, but a comment too, as long as we have administration people here, and since I will be one of five people helping to mark up a bill on this subject. Obviously when you have a comprehensive program like this, there is going to be a great deal that I can agree with and also some that I would disagree with.

I do not want to start out with finding fault with the administration at all. I do want to express, first of all, admiration that they have come forward with a program.

But I am concerned that in some areas it seems like the administration has been too timid and half-hearted in some of the approaches that they are taking. And I guess I feel this way: That we have been dealing with this problem over such a long period of time that we ought to, when we move forward with a piece of legislation, move forward with one that we feel is really going to work.

This means having the administrative tools to carry the program out. Otherwise, I think I am almost of the opinion that we should not do anything. We have had a commission study for 2 years, and for the first time some consensus that something needs to be done. So we ought to do something major.

When I say that I feel that the administration is a little too timid and half-hearted, I think it relates to the subject we have just been talking about, that of documentation. Now, there is general agreement between the administration and some of us on this committee that we ought to make it unlawful to knowingly hire illegal aliens.

I have already spoken to the point that I hope that the business trade associations in America would get behind this. It could be their contribution to help solving one of our major problems in this country. But in order for us to do that, then obviously we have to give to business and employers generally the tools with which to know whether or not the law is being violated and whether or not they are hiring undocumented people.

That gets to the point, then, of a counterfeit-proof document, work permit or social security card. I just do not like what the administration has put forward as what they claim will accomplish the goal. I do not think it will. I think it is timid in the sense that it does avoid some of the controversy, but I do not think it will get the job done and I think it is half-hearted. It makes the whole program half-hearted in the sense that this seems not to accomplish the goal of taking away the economic incentive for people to come illegally to this country.

And it is my understanding from previous testimony that this proposal was made because of the cost of a more comprehensive program. So I would like to ask you, is that the basis for the administration's position that they are against the so-called counterfeit-proof documents because of costs, or is it some philosophical objection?

Ms. **Meissner**. It is several factors, but a principal factor most certainly is cost. To reissue a social security card that would be a secure document would cost about $2 billion, and that estimate was independently verified by GAO.

There is, in addition, the question of time. It would be impossible to implement the program based on a new, more secure identifier in less than 3 to 5 years. The administration believes that we need to move more quickly on this issue. A more secure system might come down the road at some point but to wait for that is unacceptable at this time.

Senator **Grassley**. And cost is holding that back? Is that the main thing?

Ms. **Meissner**. Even if you poured all the resources available into it, you could not develop and implement a system like that in less than 3 to 5 years.

Senator **Grassley**. But we have to get started. We have to get started some day on it. I guess I am referring to what Senator Kennedy referred to in the second to the last paragraph, about the possibility of moving in that direction.

It would seem to me that even if we moved in that direction the extent to which we started issuing such counterfeit-proof ID, would be gradually phased in. I would think that illegal aliens to some extent are some of those people who need the documents near term, as opposed to having them in their possession long term.

My question, I guess, should wait for next Friday, is that right? Who are we having before us next Friday?

Senator SIMPSON. We have a significant panel and it will be on worker identification and verification systems.

Senator GRASSLEY. OK. I have expressed my point of view to these people.

I do want to make one last comment in regard to what Senator Kennedy raised about possible discrimination. It seems to me that the very essence of proper ID is to eliminate discrimination, because if a person who may appear to be, quote, unquote, "questionable" to some employer, if the proper ID is available, then there will be no discrimination.

Senator SIMPSON. That is, of course, one of the things we tried to lay to rest at the beginnings of our efforts. Any identification system is not going to be just demanded from those who appear foreign. The identification systems that we will eventually arrive at through the legislation will be required of everyone.

So the argument that there will be discrimination, I think, needs to be assessed in the searching light of that fact. We are not talking about any other kind of system.

Senator GRASSLEY. Mr. Chairman, my comment probably is as much to the members of the committee as to the administration, but I just want to amplify my personal feeling that this is the key to what we are going to do. There has got to be some check on the economic incentive for coming to this country. That has got to be placed on the back of the employer, but in the process they have to be given the proper tools.

And I do not think the administration's proposal does give the proper tools, and since it is the heart of it I would hope that you would give major consideration to that and including that in it or, in my judgment, really nothing in it at all, because we cannot continue the half-hearted approach to this problem that we have for the last several years.

Senator SIMPSON. I appreciate that very much.

Let me recognize Senator DeConcini, Dennis DeConcini, of Arizona, who is a member of the subcommittee, who was also a member of the Select Commission on Immigration and Refugee Policy, one of the four Senate Members, three of whom are on the subcommittee. It is always good to have you and your participation.

Senator DECONCINI. Thank you, Mr. Chairman.

I have a few questions that I will submit to the administration. The answers, in order to be complete, may be submitted in writing. They are of interest to some of the organizations I have worked with on this issue.

I would like to ask the representatives of the administration if they can help this Senator to understand: Did the administration, in coming forward with their proposal, rely on the findings of the Select Commission on Immigration and Refugees?

I do not say that we found all the answers by any means. But I have yet to see such an effort put together, quite frankly, where proxy members were not permitted to vote and really participate other than as observers. And I see some distinctions in the program, and I am open to any improvement. And I just wonder how much that played a part in the administration's program?

Ms. **MEISSNER**. The select commission report was a central element in the deliberations of the administration. In fact, the report was the basic primer document that everyone on the task force read and reviewed before the first set of meetings. I think if you traced through the proposals, you would see that there are differences but there are some striking similarities in the outcome as well.

Senator **DECONCINI**. Did the Attorney General participate in this task force and in the deliberations?

Ms. **MEISSNER**. Absolutely. In fact, the deliberations of the task force were somewhat similar to the deliberations of the select commission. I can say that, having participated in both.

Senator **DECONCINI**. I am pleased to hear that. I cannot help but recall Attorney General Civiletti's great commitment to this problem, and also your involvement, Ms. Meissner, in the Commission's efforts. I am pleased to know that Attorney General Smith has been personally involved in working with his staff to find a solution to this difficult problem.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM THE STATE OF ARIZONA

Senator **DECONCINI**. Mr. Chairman, the statement I would like to make for the record is very brief and it is one of frustration. First of all, compliments to you, Mr. Chairman, for not ducking this issue. There are no easy answers to these problems as I am sure the Chairman understands. Your efforts in addressing the issue and attempting to formulate legislation on it is highly commendable. Also, the amount of time that you and the staff have put in on this is outstanding in my opinion. That indicates to me your leadership and your willingness to move ahead.

Notwithstanding that, I am frustrated because I am fearful that if this body and the House do not pass something reasonable and do it soon, there will be a tremendous public outcry. I witness a great resistance to present immigration policy and what I consider an unhealthy climate in the population which may well lead toward perhaps some very drastic steps that I think would be damaging to our country as a Nation, and the community of nations.

So I am pleased that the administration is willing to take a firm position on this issue for it gives us a starting point from which we can work. I am hopeful that this Congress can report something to the American people, alhought I realize we may not fully satisfy me or some members of this committee, or possibly anyone who has an interest in the problem. I do think it is absolutely paramount, Mr. Chairman, that we take a positive action and not allow this problem to remain unaddressed through another election, through another commission, and through another study.

I will submit my written questions to members of the administration. I thank the chairman.

Senator **Simpson**. Thank you, Senator DeConcini. And I assure you that that is my pledge, that it will be addressed.

Thank you so much. I appreciate your being present. Ms. Meissner?

Ms. **Meissner**. Senator, may I make one final point? The argument about present laws and enforcement of present laws is a very attractive one. I think you should know that our own statistics within the Immigration Service are that over 60 percent of the people that we apprehend are in jobs that pay more than the minimum wage.

Senator **Simpson**. I think that is something that is not yet sufficiently recognized by the American public, but is becoming more apparent to them. We are not talking about jobs that Americans do not take.

Thank you very much. We will now go to Mr. Fuchs. We are about 25 minutes behind schedule. But if there is one thing that Mr. Fuchs learned, it was patience, as the executive director of the select commission.

So thank you again, Ms. Meissner, Mr. Lovell, Ambassador Asencio, and Mr. Hitler.

We will go now to Prof. Lawrence Fuchs of Brandeis University, formerly the executive director of the Select Commission on Immigration and Refugee Policy.

STATEMENT OF LAWRENCE H. FUCHS, JAFFE PROFESSOR OF AMERICAN CIVILIZATION AND POLITICS, BRANDEIS UNIVERSITY, FORMERLY EXECUTIVE DIRECTOR OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY

Mr. **Fuchs**. Thank you very much, Mr. Chairman. I know you want to move ahead. I have a very brief——

Senator **Simpson**. Excuse me. At this time I ask those leaving the room to be as quiet as possible. That would be appreciated.

Mr. **Fuchs**. I have a brief, if not succinct, written statement to submit, and have tried to leave as much time as possible for an exchange of views since so many of you are familiar with the ground that we have gone over, and we can develop information, I think, more satisfactorily that way.

Any discussion of this topic—and by the way, Mr. Wood, I do have copies of this very brief statement available for the committee, and 50 copies as requested.

Any discussion must begin with a clear statement as to why one believes an employer sanction law is necessary. I begin with a disclaimer. I am not one of those who believes that the continued flow, at least in the near term, of illegal aliens is likely to result in large-scale displacement of American workers. Now what do I mean by large scale? I mean on the order of 100,000 or more a year.

However, the displacement of even a smaller number of workers is a serious matter and should not be trivialized. Even if we assume that only—and this would be a low figure in most persons' judgments, although not mine—even if we assume that only 50,000 person-years were displaced, these would be American citizens or others legally eligible to work in a given year, many of whom are desperately seeking work, have families to support, and are entitled to protection from the U.S. Government.

Moreover, the cost of that, even for 50,000 person-years, is not inconsiderable. We figure a cost of $7,000 a year, and that adds up to $350 million a year, which is more than the operating cost of any of the employer sanctions—employee eligibility systems considered by the select commission.

So while I am not one of those who says we would solve our unemployment problem, because I do not believe we would, I do believe that that is a factor to be considered. I tend, however, to agree with economists who testified before the select commission that the migration of workers to the United States, even those who now come outside of the law—and here I think Senator Schmitt is probably correct—contribute to the economic growth of this country.

But I also believe that employers in the United States will continue to have an enormous appetite for labor in the years to come, and that the chances the number of illegal aliens expanding in this country really are quite good. So I am for an employer sanctions law and a secure means of identifying persons eligible to work.

I am for such a law even if one discounts economic factors. I am for such a law when it is combined with other enforcement strategies, and I will indicate in a few moments what I believe by that, because I believe that a large class of persons living outside the protection of the law in this country is harmful in many ways.

It breeds other kinds of illegality, and we had ample documentation to that effect. It undermines confidence in law generally and in immigration law specifically. It promotes the idea that only foreigners are fit for certain kinds of labor. It tends to depress working standards in sectors of the economy where standards need to be strengthened. It enlarges the number of persons in this country, adults and children, who cannot speak English or participate in mainstream American institutions. It promotes interethnic conflict.

Finally, it undercuts the foundation of our society, the belief that every individual who resides within our boundaries should as far as is humanly possible, under our 14th, 1st, 4th, and 5th amendments, receive equality of protection under the law and due process of law, have equality of freedom and opportunity.

These negative results would be sufficient for me to overcome the persuasive testimony of humanitarians who emphasize the human right to migrate and the economists who stress the importance of adding human capital to our labor force in order to promote aggregate economic growth. Probably the best way to import human capital is to make it possible for the immediate relatives of U.S. citizens and resident aliens to immigrate to this country more easily than they now are able to do and to increase the pool of legal immigrants, but not through a temporary worker program, who are admitted to this country independent of family relationships.

Once having decided that we should have a law which demagnetizes the job magnet that attracts illegal aliens, the important question is how to make such a law effective in deterring substantial flows of illegal aliens in the future. The answer is threefold:

The means of identifying employees should be reliable, and secure; it should be acceptable; and it should be instituted in conjunction with a strong program to legalize the present illegal alien population and other control measures. In all three respects, I am sorry to say the administration's proposals, however well intended, are deficient.

Security and reliability lies in the development of a system which lends itself to easy verification and inhibits would-be impostors. It must be a system that places a minimum burden on the employer and a system which provides for easy, reliable verification.

Acceptability depends upon universality, familiarity, the prevention of misuse, and a clear and simple role for employers.

Finally, the institution of this measure should be accompanied by other enforcement strategies, including a strong legalization program for the present group of undocumented aliens to help minimize enforcement problems until the employer sanctions law becomes fully operational. The institution of employer sanctions with legalization would permit concentration of enforcement resources on new flows and also provide much more precise information about the sources, patterns and impacts of illegal aliens and their migration.

It is important to keep in mind that until we have a strong legalization program it will not be possible to do that. Probably no other single act of Congress could help this country plan an intelligent immigration policy and enforce its immigration law more than a comprehensive legalization program.

The Reagan administration's proposals for amnesty will complicate rather than contribute to effective enforcement. I am afraid that is true to some degree with respect to the employer sanctions proposal.

Sixteen members of the Select Commission voted for a strong legalization program following the institution of new enforcement measures, such as employer sanctions; and 13 members of the Select Commission voted for a universal means of identifying eligible employees, although only eight thought it had to be a new, more secure means than those which already exist. Several of the members of the Commission, and initially the Reagan administration's Inter-Agency Immigration Task Force, endorsed using a counterfeit-resistant social security card for this purpose.

One additional reason given in support of the social security card as the identifier by some of the Commissioners is that it is highly desirable to protect the social security number and to establish penalties for its fraudulent use apart from dealing with the problem of illegal immigration.

Those who favor the development of such a social security card recognize that certain problems must be overcome. I will not go into those. We can go into those in the testimony and I will try to summarize very quickly.

I would like to add that my concern for effective enforcement of our immigration laws and the importance of it to this country is not meant by me to be a reflection on the personal qualities of the aliens themselves. I am convinced, after visiting with them in detention centers and other settings, that by and large they are ambitious, hard-working, law abiding, and usually motivated by nothing more than the desire to improve their lives and those of their families.

I would be much more comfortable myself testifying before you today on this employer sanctions proposal if we had an opportunity to discuss the overall comprehensive proposals for reform made by the Select Commission to make our entire immigration policy more equitable, more humane, more efficient, and more in the control of the American Congress and the American people than it is today, all of which we found to be highly desirable.

Let me say in conclusion, you asked Senator DeConcini whether or not the Inter-Agency Task Force considered the work of the Select Commission, and the answer quite properly was that they did. The chapter 10 of the staff report reviews the five basic approaches to employer sanctions which were examined by the Select Commission and which were presented in a variety of briefing papers to the Commission and have been considered by them.

What the Inter-Agency Task Force did was to take the two methods of identifying employees that the Select Commission staff and the Select Commission rejected and combined them, the use of multiple existing documents, such as the birth certificate and so on, and the affidavit system, and did not see fit to move to one of the other three systems: One which called for a number and a call-in data bank system; the other which called for a new single-use employee eligibility card tied to a data bank; and the third which called for an upgraded social security card which would be counterfeit resistant, tied to a bank.

So the answer is yes, they did consider the work of the Commission, but they did not choose the options that the Commission chose.

I thank you very much.

Senator SIMPSON. Professor Fuchs, I always appreciate your testimony and your enthusiasm. You express yourself very clearly. Even though you and I had some disagreements in our work on the Select Commission, I can certainly say without any equivocation that I came to respect you greatly and your intellectual honesty in dealing with issues that you felt strongly about. And you were not easily deterred. That is what I found. That is why it is important to hear your testimony.

You state in your remarks that the administration's identification proposal is deficient. The administration or those representing it here this morning indicates that it would take 2 years to develop a more secure counterfeit-resistant, tamperproof verification system, social security card, whatever.

What would you propose to this subcommittee as an interim or a transitional method of identifying authorized workers during any kind of development period, whether it is 2 years or 1 year or what?

Mr. FUCHS. I will answer your question directly, and then I would like to comment on it a little bit.

It will take 5 to 7 years for a single-use employee eligibility system to be fully operational. One can begin making it operational, my comments on this system would apply equally to an upgraded social security card.

I think it would be helpful, particularly to Senator Grassley and some of the other Members of the Senate who were not privy to the work of the Commission, if we inserted into the record as part of my statement chapter 10 of the Select Commission report which reviews these five systems and their advantages and their disadvantages. It is only about 40 pages long.

Senator SIMPSON. We will not include it as part of the record since the subcommittee has all that published documentation available and it would just increase the size of our cost with this. But we will indeed refer to it.

Mr. FUCHS. One can begin phasing in the new, more secure, reliable and universal system by starting with the age group that is most suspect in terms of illegality, and that is the 16-to-35-year-old age group.

It would take 5 to 7 years to get everybody in the work force, and we have 100 million people, as you all know, in the work force. It is complicated because there are approximately 70,000,000 new hires every year. That includes some people who are hired many times, and new hires who enter the work force for the first time. But it can be done.

We were convinced, and we had very exhaustive work done on it, that it can be phased in and completed by the 7-year period, although the social security might take another year or perhaps even two to become fully operational.

Now, in the meantime as you move ahead, we proposed that we adopt the affidavit system which is not incompatible with going ahead. The problem with the affidavit system for any long-term solution, of course, is that in the first place it is particularly not effective in the secondary labor market where you have people who are hired on the short term and at low skill.

In the second place, it does lend itself to some discrimination whereas a more reliable system would not. It puts more of a burden on the employer.

Now, in order to move ahead the staff believed that we should have interim application of the affidavit system, but that that should not encourage this Congress to buy employer sanctions on the cheap, so to speak; this Congress should face its responsibility and not pass it on to some other Congress down the road; and it should begin the more effective and more reliable, less discriminatory system. We came to believe that there would be less discrimination against foreign-sounding and looking persons with such a system than there is at the present time.

Senator SIMPSON. Let me develop that with one more question. Then my two colleagues might have some questions. I would like your comments on the view that any kind of employer sanctions will result in discrimination against those who have a foreign accent or appearance or who look foreign.

I would also like to know what you regard as the strongest arguments against employer sanctions and how you would rebut those.

Mr. FUCHS. All right. Well, one of the strongest arguments is that down the road——

Senator SIMPSON. I had hoped you would take the first part of that question first.

Mr. FUCHS. I think one of the strongest arguments is that down the road there will be increased discrimination. Was that not your first question?

Senator SIMPSON. I am saying that there are those who say that any form of employer sanctions will automatically discriminate against those who look foreign.

Mr. FUCHS. I believe that human prejudice will always be with us, but not because of employer sanctions; and I believe that it exists today. Today we have a system where conscientious employers not wanting to hire illegal aliens sometimes make a check with the INS. This happens fairly often in the Southwest. And the INS then has to take 2 or 3 weeks to complete that check, and some persons who are citizens or aliens eligible to work are being discriminated against because they look foreign or have a foreign accent.

So we have it today, and I think it is a myth to think that we do not have it today, that employer sanctions will introduce ethnic discrimination. Today, if someone comes in who is Anglo, for employers often presume eligibility. Well, of course, I have run across some illegal aliens who happen to look Anglo and talk Anglo, in the course of my work, and they will be employed where a foreign-looking citizen will not. So discrimination exists.

Now, what does employer sanctions do to add or decrease discrimination? If it is employer sanctions without a universal reliable means of identification, if it is employer sanctions which puts a burden of discretion on the employer, then it is true that we may see an increase in discrimination.

If it is employer sanctions, which is universal and nondiscriminatory and which does not place that burden of discretion on the employer, then in my view it will decrease the amount of discrimination that exists now, and lead to a healthier situation with respect to civil rights.

Now, the second thing that bothers people is civil liberties, and I think sometimes people get these confused in their minds, civil rights and civil liberties.

I have come to believe that our civil liberties are not threatened by a reliable means of employee identification, and that in fact such a system may lead to a stronger consciousness and stronger statutory provisions to protect our liberties. Some amendments may be necessary to the Privacy Act which gives further protection to our civil liberties.

There are those who believe in the slippery slope theory of the abuse of civil liberties; that simply by adding to our Government's information arsenal a data bank system which includes the preenrollment system for employees to be eligible to work that you will put in the hands of some future tyrant information which will be very harmful and destructive to the privacy and liberty of the people of this country.

As one—and I am sure you all agree—as one who believes that there is nothing more important to this country than our liberties, our freedom, it is an issue that has caused me some concern. But my study of the history of this country, its social life, character, political system and my understanding of the way in which a good employer sanctions law will work, the way it can be made to work, tells me that it poses no threat to our civil liberties. We are living in an age in which large amounts of information will be centrally coordinated in and outside our Government, and our protection against the misuse of that information, some of which already exists, is in the true constitution of the people as well as our written Constitution and our laws. And the true Constitution of the American people with respect to liberty has never been healthier in my view, and I see that as being our greatest strength.

Now, if there is one way to undermine our social consensus, it is to continue to ignore the fact that our immigration law has to have limits and its limits have not been enforced in a healthy way which protects civil liberties instead of through the sweeps and roundups we had in the 1930's and 1950's, and even more recently.

It seems to me we have to face this in its many-sided complexity and not simply imagine that there is somebody, a Mr. Richard Nixon or somebody, sitting up there who is going to some day call upon this particular data bank and abuse the liberties of a citizen. The bank might not have in it any identifying information beyond the eligible employee's mother's name and the employee's birthdate, so a Mr. Nixon would not be able to abuse it even if he wanted to. If it is a card and not a number that is the identifier, the card might not even have to have a photograph on it, although that does not present any problem to me.

So, that is the second major objection, civil liberties. The third, the cost, I do not agree with at all, Mr. Chairman, because the social costs here are incalculable, and the monetary costs, as I say, even from the displacement of 50,000 person years in any given year add up to more than the annual operating cost of an employer sanctions—employee eligibility system.

You see, when Doris Meissner speaks of $2 billion she is speaking of a cumulative cost, not a startup cost. The startup cost would be no more than about $100 million. And the operational cost, no matter which one of these three systems is chosen, would at most cost more than $300 million per year.

Now, when you get it operational the costs go down but the cost has to be balanced off against the other costs that we now face in our society by the illegality cost that comes out of this alone; that is to say, the breeding of illegality, being unable to get after people who are violating the law. That is a very serious matter, a great cost.

So those are three major objections—civil liberties, civil rights, and cost.

Senator SIMPSON. I am very impressed by that. I think you bring a special credence to your remarks because of your long professional and personal background as a civil libertarian and as a person who does not merely speak that way but who has proven through writings and actions throughout his professional life that he is a protector of civil liberties. That is very helpful to the subcommittee.

The issue you bring out about the cost is true. I am not necessarily talking about going back to all cardholders for a revision. If only new cardholders are covered, the figure drops substantially.

Well, I have taken over my 5 minutes' worth. Let me very briefly get back to the issue of legalization. We will, I think, try to get your testimony in writing.

You and I do not share the same view there. I believe that legalization can be acceptable only when we have our enforcement mechanisms in place and effective. You believe in the need for a strong legislative program to help minimize the enforcement problem until the employer sanctions law becomes fully operational. We will kick that around.

Senator DeConcini, do you have any questions for Professor Fuchs?

Senator DeConcini. Mr. Chairman, I concur with your laudatory remarks regarding Dr. Fuchs, and we are glad to have him here.

You know, Mr. Chairman, in my effort to deal with this subject matter in the short time I have been here I have come across a number of people who have devoted a great deal of time and effort to studying our immigration problems. Dr. Fuchs stands out among these people and I consider him to truly be an expert.

I worked with him on the commission and although I did not always agree with him, as you also mentioned you did not, Mr. Chairman, I place a great deal of credibility in his statement and in the testimony he has given today.

Dr. Fuchs, I will address to you a few short questions and if you would care to be concise in your responses, that would be fine with me.

Mr. Fuchs. You know your customers.

Senator DeConcini. Did the Select Commission commit any amount of resources to studying the European experience with employer sanctions?

Mr. Fuchs. No, Senator DeConcini, it did not.

Senator DeConcini. Are there any such studies, to your knowledge?

Mr. Fuchs. No, Senator DeConcini.

Senator DeConcini. And do you know if the European sanctions on employers has decreased the illegal alien population?

Mr. Fuchs. No, I do not.

Senator DeConcini. Do you feel that employer sanctions would in any way drive undocumented aliens further underground than they are thus creating more of a subculture than is already in existence?

Mr. Fuchs. It is possible that a weak system, one that was not universal and did not apply to everyone, one that used multiple documents easy to forge, easily purchased, it is possible that it would have the effect of continued evasion on the part of some and encourage them to go further underground.

Senator DeConcini. You point out in your statement the necessity of putting together a total policy or program. Is it your position that implementing employer sanctions alone without the other provisons of the administration's program would be worse than enacting nothing at all to deal with the problem before us?

Mr. **Fuchs**. If I were a U.S. Senator, I am not certain how I would vote at the end of the debate and the discussion, even though I have had 2½ years of very close study of this.

As of this moment I would vote against, because I would see employer sanctions as of this moment as a wrong statement to make by the Congress of the United States to the American people, if it were done in a vacuum.

I also believe very strongly—and this is the one major disagreement that the chairman, for whom I have the greatest affection and regard—and I have had; and that is, I see the legalization program as being integral to an overall program of getting our house in order, in control, and I see a great displacement of effort and waste of resources and complication of any employer sanctions effort by our failure to do that simultaneously. So I do have that problem.

I would also like to see other reforms. I think it is a mistake to eat away at this on a piecemeal basis, but I would be willing to say that there are short-term reforms dealing with illegal migration which might come first in a first package, and then the overall reform.

But if we are to do the short-term reform dealing with illegal migration, it would be a great mistake not to get at least 60 percent of the illegal aliens who now are in this country in a legalization program.

Senator **DeConcini**. Dr. Fuchs, did the Select Commission have any findings regarding the ill effects of illegal immigration?

Mr. **Fuchs**. Yes.

Senator **DeConcini**. Can you give us a short statement of what these findings were and of how comprehensive you believe them to be.

Mr. **Fuchs**. The negative effects of illegal immigration were documented thoroughly. As indicated earlier, there is some displacement of American workers. The amount is in dispute. There is an erosion of labor standards in certain sectors of the economy, particularly in certain sections of the country. Also, there are negative social effects. As I indicated to you, those were the ones that impressed me the most: The breeding of illegality; the existence of a population that sometimes will not report its own health problems for fear of being detected; that sometimes does not even send their children to school, even children who are born in the United States; and that in some cases will not even report crimes against them even when they are serious crimes. These social effects are harmful to us as a society.

We also believe that the presence of a large number of persons living outside of the law has a very deleterious effect on how the American people view immigration as a whole.

Since the Select Commission has found that legal immigration was in the national interest of the United States at approximately present levels and recommended strongly that the front door be kept open and in fact be widened slightly to accommodate the necessary reforms, it is all the more important to not undermine that confidence. And therefore, the Select Commission had that as another major finding: That a continued migration of illegal aliens to this country and continued living of such persons outside of the law undermined confidence in our immigration policy generally.

Senator **DeConcini**. Mr. Chairman, thank you for the time, and I concur with many of your positions on this issue. I hope and recommend that the chairman will call Dr. Fuchs again to testify on the question of legalization and or several other problem areas this committee will address.

Thank you.

Senator **Simpson**. Senator DeConcini, if I may respond to one of your questions, we will be hearing today Prof. Mack Miller of the University of Delaware who will testify concerning the European system. In addition on Friday we will be hearing from Prof. Phillip Martin of the University of California at Davis, an authority on European employer sanction systems. We will be looking forward to this legislation.

Senator Grassley.

Senator **Grassley**. Mr. Chairman, I would like to bring up just a little variation of this legalization program as long as he is here. Not to go into the depth that obviously you feel we do not have time to go into, but I would like an explanation of why you feel that legalization in conjunction with documentation is better and an absolute necessity as opposed to amnesty in conjunction with documentation?

Mr. **Fuchs**. Well, amnesty is another word for legalization. The amnesty—and it is a perfectly acceptable word to me—the difference between the——

Senator **Grassley**. You did use the statement that the administration's proposal for amnesty will complicate rather than contribute to effective——

Mr. **Fuchs**. Yes. And the reason for that is that we concluded that a proposal such as the administration proposal is not likely to produce much of a turnout. We will hold an amnesty, and we will be defeated in our purpose which is to get these people out the shadows and to simplify our enforcement problem in the deterrence of future flows.

Senator **Grassley**. So legalization is essential to bring them out?

Mr. **Fuchs**. To bring them out. And the reason it is essential to bring them out is that if you begin tomorrow with an employer sanctions law and beefed up enforcement, more inspectors and more investigators, you would still have the problem of this large number of people living outside of the law who are subject to arrest and deportation, apprehension and deportation.

You have them living in the interior, many of them having been around for quite some time, some of whom who have established equities here, and some of whom have been recruited by American employers. They know the ropes. They are the most difficult people to apprehend, and they are the people who came under conditions of what may be called, I think, American policy ambiguity.

They are persons who come from all over the world. We know very little about their migration patterns, their impacts and even their sources. We make educated guesses with respect to these matters.

When we talk about illegal aliens we are talking about such a variety of different people. Let me give you an example. We did one study at the Select Commission of returned migrants to Costa Rica and El Salvador. More than 50 percent of the Costa Ricans entered the United States as tourists. Now, that should tell us something about how to stop that flow from Costa Rica.

A large majority from El Salvador came across the border. That tells us something about that population, but it does not tell us the way they came across the border, the smuggler use patterns, the particular migration routes that they followed, the areas that they came from and so on.

The only way we will ever get that information and information about the impacts of illegal aliens on the U.S. economy in a reliable fashion will be if we have—in conjunction with employer sanctions—a substantial legalization program that gets those people who have been around for a while out into the open and gets them into the resident alien status, not a temporary worker status whereby they cannot bring a wife or a child, which is one of the greatest pressures for illegal migration—the inability to reunify immediate family.

So the administration proposal, dilly-dallies around legalization instead of going at it four square, and the same thing is true, I believe, of the employer sanctions proposal.

I think the administration people worked very hard on developing their proposal, and I think they did look very carefully at what the Select Commission had to say, but they came up with some conclusions that I think are tentative. That is not good in tennis and it is not good in employer sanctions or legalization either.

Senator SIMPSON. Thank you very much, Professor Fuchs. I have some other questions. I will submit those in writing. It is always great to see you, sir.

[The prepared statement of Mr. Fuchs follows:]

PREPARED STATEMENT OF LAWRENCE H. FUCHS

My name is Lawrence H. Fuchs. Currently, I am a professor of American Civilization and Politics at Brandeis University. On May 1, 1981 I concluded my responsibilities as Executive Director of the staff of the Select Commission on Immigration and Refugee Policy.

Any discussions on this topic must begin with a clear statement as to why one believes in a law which would penalize employers for hiring persons ineligible to work and a secure means for identifying such persons.

I begin with a disclaimer. I do not believe that the continued flow of illegal aliens to this country is likely to result in the large-scale displacement of American workers. I tend to agree with economists who testified before the Select Commission that the migration of workers to the United States -- even those who now come outside of the law -- contribute to the economic growth of this country. I also believe that employers in the United States will continue to have an enormous appetite for labor in the years to come. Yet, I am for an employer sanctions law and a secure means of identifying persons eligible to work.

I am for such a law when combined with other enforcement strategies -- as I will indicate in a few moments -- because I believe that a large class of persons living outside of the protection of the law in this country is harmful in many ways:

- It breeds other kinds of illegality;
- It undermines confidence in the law generally and in immigration laws specifically;
- It promotes the idea that only foreigners are fit for certain kinds of labor;
- It tends to depress working standards in sectors of the economy where standards need to be strengthened;

- It enlarges the number of persons in this country -- adults and children -- who cannot speak English and participate in mainstream American institutions;
- It promotes inter-ethnic conflict;
- And, finally, it undercuts the foundation of our society -- the belief that every individual who resides within our boundaries should, as far as is humanly possible, have equality of opportunity.

These negative results are sufficient for me to overcome the persuasive testimony from humanitarians who emphasize the human right to migrate and economists who stress the importance of adding human capital to our labor force in order to promote aggregate economic growth. Probably the best way to do that is to make it possible for the immediate relatives of U.S. citizens and resident aliens to immigrate to this country more easily than they now are able to do and to increase the pool of legal immigrants who are admitted to this country independent of family relationships.

Once having decided that we should have a law which demagnetizes the job magnet that attracts illegal aliens, the important question is how to make such a law effective in deterring substantial flows of illegal aliens in the future.

The answer is threefold. The means of identifying employees should be secure; it should be acceptable; and it should be instituted in conjunction with a strong program to legalize the present illegal alien population.

In all three respects, the Administration's proposals, however well intended, are deficient. Security lies in the development of a system which lends itself to easy verification and inhibits would-be impostors. Acceptability depends upon universality, familiarity, the prevention of misuse and a clear and simple role for employers; finally, the institution of this measure should be accompanied by other enforcement strategies, including a strong legalization program for the present group of undocumented aliens to help minimize enforcement problems until the employer sanctions law becomes fully operational. The institution of employer sanctions with legalization would permit concentration of enforcement resources on new flows and also provide much more precise information about the sources, patterns and impacts of illegal migration. It is important to keep in mind that until we have a strong legalization program, it will not be possible to do that. Probably no other single act of Congress could help this country plan an intelligent immigration policy and enforce its immigration law more than a comprehensive legalization program. The Reagan Administration's proposal for amnesty will complicate rather than contribute to effective enforcement.

Sixteen members of the Select Commission voted for a strong legalization program upon the institution of new enforcement measures such as employer sanctions, and 13 members of the Select Commission voted for a universal means of identifying eligible employees although only 7 8 thought it had to be a new, more secure means than those which already exist. Several of the members of the Commission and initially the Reagan Administration's Inter Agency Immigration Task Force endorsed using a counterfeit-resistant Social Security card for this purpose. One additional reason given in support of the Social Security card as the identifier is that it is highly desirable to protect the Social Security number and to establish penalties for its fraudulent use apart from dealing with the problem of illegal migration.

Those who favor the development of such a Social Security card recognize that certain problems must be overcome. First, since the Social Security system is not now universal, it would have to be made universal for this specific purpose. Second, we must strengthen the administrative system for obtaining Social Security cards so as to make that procedure more secure than it now is.

Third, we must be prepared to spend money, although a system which relied on an upgraded Social Security card would be less costly than a totally new system.

Finally, Mr. Chairman, I would like to add that my concern for effective enforcement of our immigration law is not a negative comment on the aliens themselves. I am convinced after visiting with them at detention centers and in other settings that they are ambitious, hard-working, law-abiding, and usually motivated by nothing more than the desire to improve their lives and those of their families. I would be much more comfortable testifying before you today on a means of keeping persons out of this country if our immigration policy and its administration were reformed along the lines recommended by the Select Commission to make it more equitable, humane, and efficient.

Thank you, Mr. Chairman.

Senator SIMPSON. Now we will go directly to the labor panel. Dr. Rudy Oswald, director of the department of economic research of the AFL-CIO and Ms. Stephanie Bower, coordinator of the legislative department of the United Farm Workers.

It is a pleasure to have both of you here. We apologize for the little delay in operation, but I will roost right here until we are finished, so feel free. We will use the amount of time allocated under the original agenda.

Nice to see you this morning.

STATEMENT OF DR. RUDY OSWALD, DIRECTOR, DEPARTMENT OF ECONOMIC RESEARCH, AFL-CIO

Mr. OSWALD. Thank you. My name is Rudy Oswald, and I am director of the department of economic research for the AFL-CIO. And we appreciate this opportunity to present the views of the AFL-CIO on sanctions against employers who hire illegal immigrants.

I have a statement with a comment by the recent AFL-CIO Executive Council meeting on August 5 dealing with the issue of immigration reform, and I ask that that statement be made part of the record, and I would like to just highlight part of that statement.

Senator SIMPSON. Without objection, so ordered.

Mr. OSWALD. Thank you.

The AFL-CIO supports the concept of a coordinated, integrated immigration policy. We believe that the cornerstone of such a policy must be effective employer sanctions.

The AFL-CIO will continue to work for an immigration policy that is humane, compassionate and consistent with the needs and aspirations of American workers. One essential goal of the U.S. immigration policy must be to stop all illegal immigration, and one essential means to achieve this goal is to provide strong, effective Federal sanctions against employers who hire illegal immigrants, including injunctions backed by criminal contempt penalties for repeat violators.

The lure of jobs is what brings most illegal workers into the United States. Illegal workers take jobs away from American workers, and they undermine U.S. wages and working conditions. Many employers will hire illegal workers because illegal aliens are willing to work hard for long hours and little pay. This is because low though they may be, the substandard wages are sometimes above, the minimum wage, and the wages and conditions here may be better than those in their own native country.

Their need for work and their continuous liability to deportation if they do not behave and accept what is offered to them leaves them subject to intimidation by unscrupulous, exploiting employers who deliberately choose and often seek out illegal alien workers.

Decent, law-abiding employers suffer unfair competition from the unscrupulous employers of illegal workers who pay low wages and avoid their legal and social responsibilities to withhold income taxes and to make social security and unemployment insurance payments.

Both illegal workers and their employers are participants in an illegal and antisocial underground economy. The quickest and best way to stop illegal immigration is to stop giving jobs to illegal immigrants. Unfortunately, while the Reagan administration proposals for sanctions against employers of illegal aliens are steps in the right direction, they do not go far enough.

We believe that the penalty for hiring illegal aliens should be up to $1,000 per worker per day, and that there should be no exclusion for employers of less than four illegal aliens.

We are pleased that the President recognized the need for a penalty, and we believe that those penalties should be even stronger deterrents. However, we see in the exception for employers of less than three illegal aliens the creation of a double standard which could easily lead to a new slave culture in which wealthy families would get away with exploitation of an illegal immigrant and possibly a married illegal immigrant couple as household help in domestic service. We believe this is intolerable.

But we believe that as part of employer sanctions one needs a viable identification system and effective border controls.

We have described in our testimony the implications for unemployment among minorities and substandard working conditions that result from the high impact of competition from illegal aliens and the impact on unemployment.

You had raised questions earlier, Senator, about the identification system, and while we would be willing to accept the administration's recommendations as an interim identification mechanism, we believe that there is no alternative in the long run except to have a permanent, counterfeit-proof identification system such as an improved, secure, counterfeit-proof social security card.

Only under that fashion would you really allow the employer to have a real means of identifying who is and who is not an illegal alien.

You had raised questions earlier about the issue of civil liberties and civil rights. The AFL–CIO Executive Council has considered this issue many times and has debated the issue in great detail. It has come to the conclusion that there must be such a card or some type of equivalent that allows the employer to make a positive identification of an American worker. Such a card, once granted, cannot be withdrawn by Government and must be a permanent type of card that assures workers that the employer will not discriminate against people with foreign names or foreign language as part of their background.

We suggest that the costs involved are relatively small and are certainly small in terms of the costs that are involved in displacement of U.S. workers. If there are just 1 million illegal workers taking U.S. jobs from American workers, the loss currently to the Treasury and the cost of higher welfare and unemployment costs to the Nation runs some $30 billion or 1 percent unemployment.

Mr. Chairman, we thank you for being allowed to summarize the concerns of the AFL–CIO in this area and to highlight some of the issues that are before your subcommittee at this time.

[The prepared statement of Mr. Oswald follows:]

PREPARED STATEMENT OF RUDY OSWALD

Mr. Chairman, my name is Rudy Oswald, and I am Director of the Department of Economic Research for the AFL-CIO. We appreciate this opportunity to present the views of the AFL-CIO on the issue of sanctions against employers who hire illegal immigrants.

There are few more important responsibilities entrusted to the federal government than control of immigration. And yet the nation's immigration policy is, and for many years has been in disarray. Illegal immigration is so widespread as to cast doubt on the nation's capacity to deal with this serious problem and with the social, political, and economic problems that result from illegal immigration.

The AFL-CIO supports the concept of a coordinated, integrated, immigration policy. The cornerstone of such a policy must be effective employer sanctions.

The AFL-CIO will continue to work for an immigration policy that is humane, compassionate, and consistent with the needs and aspirations of American workers.

One essential goal of United States immigration policy must be to stop all illegal immigration.

And one essential means to achieve this goal is to provide strong, effective federal sanctions against employers who hire illegal immigrants, including injunctions backed by criminal contempt penalties for repeat violators.

The lure of jobs is what brings and keeps most illegal workers into the U.S.A. Illegal workers take jobs away from American workers and they undermine U.S. wages and working conditions. Many employers will hire illegal workers because illegal aliens are willing to work hard for long hours and little pay. This is because, low though they may be, the substandard wages they receive and the conditions under which they work are still better than the wages and working conditions in their native country. Their need for work and their continuous liability to deportation if they don't behave and accept what is offered to them leaves them subject to intimidation by unscrupulous, exploiting employers who deliberately choose and often seek out illegal alien workers.

Decent, law-abiding employers suffer unfair competition from the unscrupulous employers of illegal workers who pay low wages and avoid their legal and social responsibilities to withhold income taxes and to make Social Security and unemployment insurance payments. Both illegal workers and their employers are participants in an illegal and anti-social "underground economy."

The quickest and the best way to stop illegal immigration is to stop giving jobs to illegal immigrants.

Unfortunately, while the Reagan Administration proposals for sanctions against employers of illegal aliens are a step in the right direction, they do not go far enough.

We believe that the penalty for hiring illegal aliens should be up to $1,000 per worker per day and that there should be no exclusion for employers of less than four illegal aliens.

We are pleased that the President recognized the need for penalties and we believe these penalties should be even stronger deterrents. However, we see in the exemption for employers of less than three illegal aliens the creation of a double-standard which could easily lead to a "slave culture" in which wealthy families could get away with exploitation of an illegal immigrant, and possibly a married illegal immigrant couple, as household help in domestic service. This is intolerable.

Finally, in this discussion of employer sanctions, let me note that the AFL-CIO endorsed the recommendation of the Select Commission on Immigration and Refugee Policy that legislation be passed making it illegal for employers to hire undocumented workers. (II.B.1)

Likewise, we endorsed the Select Commission's recommendation that the enforcement of existing wage and working standards legislation be increased in conjunction with the enforcement of employer responsibility. (II.B.2)

We are encouraged by these key Commission recommendations for employer sanctions because they reflect an emerging national consensus that the serious problem of illegal immigration demands immediate action by Congress.

Employer sanctions, a workable identification system, and effective border controls and interior enforcement are essential components of the necessary attack on illegal immigration.

The Impact of Illegal Alien Workers

Let me turn now to discuss the dimensions of the problem of illegal immigrants and illegal alien workers in the United States.

The numbers are astounding. Although there are not any reliable numbers on illegal aliens in the United States, informed estimates range from about 3 million to 12 million with some speculation that the true number lies in the range from 6 million to 8 million. In 1980, the number of deportable aliens located by the INS was 903,000 -- and obviously these huge numbers do not include all those illegal aliens who were not found by the Border Patrols.

Not all illegal aliens in the United States "sneak" into the country unlawfully. Many aliens enter legally -- often as students or tourists -- but subsequently violate the terms of their admission and become illegal immigrants and illegal workers.

This illegal workforce constitutes a particular threat to American workers who are most likely to be in low wage jobs -- black and Hispanic workers, women, and youth.

The unfair competition for jobs by illegal aliens is particularly damaging at a time when the unemployment rate is 7.2 percent, (in August, 1981) representing more than 7½ million workers. The unemployment rate for black workers is 15 percent and for Hispanic workers is 9.7 percent. For adult women, unemployment is 6.5 percent. For teenagers unemployment is 18.8 percent, but for black teenagers, joblessness is up to a horrendous 45.7 percent

Large numbers of illegal aliens also put a strain on already burdened cities. In New York City, for example, with an unemployment rate of 8.1 percent, the number of illegal residents is estimated at over 750,000.

Illegal alien workers depress U.S. wages and working conditions directly as illegal workers put in longer hours for less pay -- and also depress U.S. wages and working conditions indirectly by flooding already weak labor markets with surplus workers.

Illegal workers earned wages that were 40 percent less than those of legal workers, according to a study cited in a March, 1980 report by the Comptroller General. In 1980, an INS report shows 39 percent of illegal aliens who were found to be working, earned less than $3.25 an hour, and it is clear many of them were paid below the minimum wage. And 96 percent of these illegal workers earned less than the average hourly earnings of the average non-supervisory worker in the U.S.A.

Illegal alien workers also put in 24 percent more hours per week, on average according to the study cited by the Comptroller General's report. This indicates there must have been a lot of unpaid overtime and a lot of violations of the Fair Labor Standards Act. In fact, wage-hour investigators for the U.S. Labor Department uncovered $15 million in under payments to 94,000 illegal aliens during the first half of fiscal 1980.

Identification

An effective identification system is essential to an effective employer sanctions system. The government must give employers an effective method to determine who is a legal worker and who is an illegal worker.

The Administration has made recommendations for INS documentation or any two documents including birth certificate, driver's license, Social Security card, and Selective Service registration card. These alternatives are acceptable as short-term interim methods of identification. However, we believe the only effective long-term solution to the identification problem is to have a permanent, counterfeit-proof identification system such as an improved, secure, counterfeit-proof Social Security card.

With a secure, counterfeit-proof identification system, there is no justification for having to prove employer intent. We urge that "knowingly" be excluded from any prohibition against employers hiring illegal aliens.

Let me repeat, without an effective identification system, employer sanctions will not work. Indeed, it is possible that sanctions might lead some employers to discriminate against some U.S. citizen workers. Therefore, we believe that federal law must protect American workers from employer discrimination by creating a counterfeit-proof system of identification for work purposes.

The potential for discrimination is serious enough to warrant development of a secure identification mechanism to enable employers to determine readily the legal status of job applicants. There must also be stringent, effective enforcement of civil rights laws to protect workers against any possible employer discrimination against U.S. citizens with Hispanic surnames or any other U.S. citizens.

While we oppose any "work permit" as used in Europe, we believe there must be a standard identification system to be checked by the employer at the time of hiring.

We believe two fundamental safeguards are necessary for eventual implementation of a standard identifier: (1) a requirement that no person eligible under the law be denied documentation; (2) a further requirement that no documentation can be revoked if issued according to the law. Because it is recognized familiar and already required in job applications, the Social Security card could be used if improved and made counterfeit-proof.

Until an effective identification system is developed, other evidence could be used. The alternatives could include a birth certificate, naturalization certificate, alien registration card, voter registration, U.S. passport, or immigration or registration document. The employer should certify with a checkmark on a regular form, such as the W-4, that such identification has been examined.

Some people argue that an effective, secure identification system -- whether using a counterfeit-proof Social Security card or a data-bank or some other system -- will have high start-up costs. We suggest that unemployment of U.S. citizens displaced by illegal alien workers has a high cost also, with a $30 billion cost to the U.S. Treasury in lost tax revenues and higher welfare and unemployment costs for each 1 million unemployed workers.

Border Control and Interior Enforcement

Effective border control and interior enforcement are essential to stop illegal immigration.

Therefore, we welcome, as a step in the right direction, the Administration's proposals for increased resources for the Border Patrol and other enforcement activities of the Immigration and Naturalization Service. Likewise, we welcome the Administration's proposals for increased resources for Labor Department enforcement of fair labor standards and laws.

However, significant increases in funding and resources are necessary to strengthen border control and prevent illegal immigration. We also support the Select Commission in urging more effective interior enforcement with follow-up and verification of departure by non-immigrant persons in the U.S.A. with legal visas. (II.A.6).

And we urge adequate support by the Executive Branch and adequate funding by the Congress to strengthen border and interior enforcement activities of the Immigration and Naturalization Service and to strengthen anti-smuggling activities to stop illegal entry and illegal immigration.

As we have in the past, the AFL-CIO urges that the funding and staffing of the INS be increased to the point where this government agency may perform its important mission of providing a system of orderly immigration to the U.S., while protecting American workers from unfair competition of illegal foreign labor.

Conclusion

In conclusion, Mr. Chairman, let me repeat the basic rationale for the position of the AFL-CIO in support of strong effective federal sanctions against employers who hire illegal immigrants.

The primary reason illegal aliens migrate to the United States is the lure of jobs and income opportunities. Jobs lure the illegal aliens and many employers will hire them because illegal aliens are willing to work hard for long hours and little pay. The result, of course, is serious undermining and undercutting of wages and working conditions and job opportunities for U.S. citizen workers.

To stop the flood of illegal immigrant workers, we believe there must be strong employer sanctions, a workable, counterfeit-proof identification system, and more effective border controls and interior enforcement.

We urge Congress to move forward promptly on these components of the necessary attack on illegal immigration.

Mr. Chairman, I would appreciate inclusion in the record of a recent AFL-CIO Executive Council statement on "Immigration Reform."

Thank you.

Statement by the AFL-CIO Executive Council
on
Immigration Reform

August 5, 1981
Chicago, Ill.

There are few more important responsibilities entrusted to the federal government than control of immigration. Yet this nation's immigration policy is, and for many years has been, in disarray. A thorough review and overhaul of that policy is long overdue.

While we are deeply concerned by several shortcomings in the proposal put forth by the Administration, it provides a basis for action.

We, therefore, urge the Congress to come to grips with and provide sound solutions to the difficult social, political and economic problems involved. The AFL-CIO pledges that organized labor will take an active role in the effort to pass constructive legislation.

The key to controlling illegal immigration is an effective system of sanctions against employers who hire illegal immigrants, including injunctions backed by criminal contempt for repeat violators. In turn, the basis for such a system is counterfeit-proof identification such as a secure Social Security card. The Administration's proposal for civil sanctions where the employer has not acted in good faith relies on documents easily counterfeited and freely available for sale. These sanctions will not be even a minor inconvenience to those who hire illegal workers. We will continue to press for an effective system of sanctions, based on counterfeit-proof identification, against employers who knowingl employ illegal immigrants.

Effective border control and interior enforcement are also essential. To achieve such control and enforcement, additional funding and staffing for the Immigration and Naturalization Service are necessary. We support, too, the efforts of INS workers through their union organization to call attention to the need for additional resources and for a clear sense of agency purpose.

The AFL-CIO supports a fair and generous program to legalize the status of illegal immigrants who have become part of the American community so long as that program operates in tandem with an effective program for cutting off the further flow of illegal immigration. Conditions consistent with a compassionate regard for the families involved should be set with a minimum of formality to make citizenship possible for individuals who presently have a strong attachment to this country while not encouraging illegal immigration in the future.

We, therefore, have serious reservations about the Administration's "amnesty" proposal. We believe the basic preconditions that would unfairly apply to illegal immigrants and not to the Cuban or Haitian refugees are wrong and that a 15-year waiting period, a denial of reunification of families, payment of taxes without the right to the earned benefits accorded other taxpayers such as unemployment compensation, and a novel requirement of English language proficiency are so harsh as to belie the very concept of amnesty.

Over the long run and after illegal immigration is controlled, we support the concept of expanded legal immigration. But first we must cure our unemployment problems and absorb into our society the millions of illegal immigrants and refugees who have arrived during the past decade.

We are opposed to the Administration's proposed guest worker program. We reiterate what we have said before: The AFL-CIO is against any program which would permit importation of foreign labor to undercut U.S. wages and working conditions. A guest worker program will make the already high level of unemployment even worse and will undermine the already low level of wages in those industries that are most likely to employ such temporary workers. Women and minority workers are most likely to suffer job loss and income cuts.

We also oppose the Administration's suggested revision of the H-2 (temporary worker) program, a revision that will surely result in the program's expansion. The Select Commission on Immigration and Refugee Policy stated "that government, employers and unions should cooperate to end the dependence of any industry on a constant supply of H-2 workers."

The proposed 50,000 a year guest worker program and the changes in the H-2 worker certification requirements must be assessed in combination with the suggested 40,000 a year increase in legal immigration from Mexico and Canada. With the H-2 workers, the total increase will be more than 100,000 immigrants a year, far more than present conditions justify.

Finally, we call on the Congress in considering the overall question of immigration to assure that the Government has ample authority to continue its historic policy of providing refuge to the victims of political oppression.

The AFL-CIO will continue to work for an immigration policy that is humane, compassionate and consistent with the needs and aspirations of American workers.

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Senator **Simpson**. Thank you very much.

Your testimony and the knowledge that we have of who you represent in this country is a very important part of our deliberations. It is these types of varied groups, all interested in correcting a situation that needs correcting, which have given us a great deal of help and impetus in our work. The AFL-CIO has been very helpful to us. We appreciate that very much.

I will ask Ms. Bower to testify now. Then we will have some specific questions for each of you. Please proceed.

STATEMENT OF STEPHANIE BOWER, COORDINATOR, LEGISLATIVE DEPARTMENT, UNITED FARM WORKERS

Ms. **Bower**. Mr. Chairman, my name is Stephanie Bower, and I am legislative representative for the United Farm Workers, members of the AFL-CIO.

We are thankful for the invitation to express our viewpoint on the proposed legislation which would impose sanctions on employers who hire illegal aliens.

United Farm Workers believes that local farmworkers who wait in line by the hundreds at our union hiring halls should have jobs. There has always been an oversupply of labor for the field. Currently, unemployment among Hispanics, which is a large part of our membership, is 9.7 percent, and 15 percent among the black population, and over 50 percent among black youths who comprise a large number of farmworkers in Florida.

We therefore concur with the AFL-CIO's position that imposing sanctions on employers who hire illegal aliens would be a good vehicle for controlling the hiring of illegal aliens if the proposed legislation could be effectively enforced.

The proposed fine should be raised to $1,500 per worker per day because the $500 might not be enough of a deterrent, as employers paying health insurance and other benefits for workers might have to pay the same amount.

Laws covering farmworkers have rarely been enforced. There have been murders in the fields during our strikes, and never has anyone spent even as much as a night in jail. There have been abuses of the laws covering sanitation and housing and child labor. These laws have not been enforced. And the times when laws have been enforced, when it comes to employers hiring illegal aliens, the enforcement has been a ruse.

We strongly urge that a large budget for staff and operations be allocated toward the enforcement of this proposed legislation. We believe that each worker should be issued a counterfeit-proof social security card for identification purposes. Issuing social security cards to farmworkers would put more money into the social security system, as well as providing income for farmworkers in their older years.

At the present time, many growers and labor contractors hold back the employee's social security. This card would also stop that practice.

Employers of farmworkers have traditionally hired workers who do not complain. They sleep under trees and in pup tents, and I have a couple of pictures from Arizona that show this. On several occasions Puerto Rican workers brought to the east coast to pick apples were dismissed in favor of Caribbean workers who do not require benefits such as social security.

Many farm employers are racist, and we feel they would like to institutionalize a permanent subclass of Mexicans in the United States.

We believe that each worker should be issued a social security card so that farmworkers, as well as other workers in this country, can be brought into the system and not have to live outside of that system.

Coverage of the proposed legislation should not be limited to employers who hire more than four employees. The United Farm Workers supports the right of domestic workers to organize. If their employers are not covered under the proposed legislation imposing sanctions, it would be an unjust law.

The United Farm Workers also would like to see an expanded program for economic development in the country from which illegal aliens come. Any such program involving U.S. aid must make certain that jobs, wages and conditions in the United States are not lost or undermined, decent wages, labor standards which are enforced, and decent working conditions, develop the kind of economy which will take the pressure off of families and keep them from seeking work in the United States illegally.

Finally, before any such legislation bearing any resemblance to the bracero program is seriously considered, there should be a strong positive program to analyze the labor needs of farmworkers and to place them in jobs in their respective local communities.

Thank you very much.

[The prepared statement of Ms. Bower follows:]

PREPARED STATEMENT OF STEPHANIE BOWER

On behalf of the United Farm Workers, AFL-CIO, I am eager to express our view point on the proposed legislation which would impose sanctions on employers who hire illegal aliens.

AVAILABILITY OF LOCAL WORKERS

The United Farm Workers is composed of minority groups - Hispanics, Blacks, Filipinos among others. In the West and the Southwest, the American farmworker population is largely Hispanic. Each day these local workers wait in line by the hundreds at our Union hiring halls for employment. There has always been an oversupply of labor for the fields. We don't, however, see attempts being made anywhere to develop a local farmworker labor force when it is common knowledge that unemployment among hispanics is 9.7%, 15% among the black population and over 50% among black youth.

EMPLOYER SANCTIONS AND ENFORCEMENT OF SUCH SANCTIONS

We concur with the AFL-CIO's position that sanctions imposed upon employers who hire illegal aliens would be an effective way of controlling the hiring of illegal aliens if the proposed legislation could be effectively enforced.

We feel that the proposed fine of $500 - $1000 is not high enough and should be raised to $1500 per worker per day. As it is now proposed it is not enough of a deterrent. An employer may have to pay $500 for health insurance for a Union member.

We cannot help but question that if even the most stringent of fines is placed on farm employers who hire illegal aliens, who will enforce the proposed legislation?

Murder has long been considered a felony in America, incurring in some cases the death penalty - yet, in all of the history of farm labor organizing, when workers have been murdered during strikes, not one of the responsible parties has spent as much as one night in jail.

There have been laws which mandate sanitation facilities, yet farmworkers continue to work with no toilets in the field; and laws have long been on the books abolishing child labor, yet where the United Farm Workers have no contracts, children continue to perform back breaking work.

When laws against hiring illegal aliens are enforced, it it only a ruse.

We feel it necessary, therefore, to suggest that a large budget be allocated for staff and operations in order that the proposed legislation be enforceable both nationally and on the local level.

SOCIAL SECURITY CARDS

If employer sanctions were to become a reality, it would be imperative that each worker be given a counterfeit-proof social security card for identification purposes, and that every effort be made to see that discrimination of local hispanic and black workers does not occur.

Issuing social security cards to farmworkers would mean more money in the social security system and also security to the workers in their older years.

Employers have traditionally done everything possible to avoid allowing the American farmworker into a system which would provide them with deserved benefits. Bringing in contract workers robs the social security system of money.

At the present time, many growers and labor contractors hold back social security money. If the farmworkers all had social security cards, the emploeyrs would not be able to continue this practice.

Our Union represents decent wages and living conditions for farmworkers. Employers have traditionally encouraged the employment of illegal aliens. They sleep in pup tents, caves and under the trees. They are brought to this country to be exploited. The late Dorothy Day, founder of the Catholic Worker Movement, on her travels through the South West, shared her disgust with her travelling companion when she remarked that the animals have better places to live than the people who plant and harvest our food.

There have been several occasions when Puerto Rican workers who were brought to the East Coast to pick apples were dismissed in favor of Caribbean workers who do not require social security benefits. The United Farm Workers in Washington, D.C. housed several of these workers in 1976 as they were determined to fight this discrimination legally.

In 1973 a black reporter from Florida, in a study called "Offshore" cited examples of Caribbean H2 workers who were sent home when they complained of their conditions.

Most farm employers see an endless supply of slave labor and this attitude must be stopped. The United Farm Workers have found since we began organizing on the West Coast that most farmworker employers are racist. They would like to institutionalize and make a permanent sub-class of Mexicans in America.

We believe that it is essential for all farmworkers to be provided social security cards, and be allowed to participate in the Social Security System.

LIMITATION OF SANCTIONS TO EMPLOYERS WITH MORE THAN FOUR EMPLOYEES

The United Farm Workers Union believes that limiting the coverage of the proposed legislation to employers with more than four employees is unjust. Most employers of domestic workers hire less than four persons. At the United Farm Workers Convention, held September 5 - 7, 1981, we supported through a Resolution, the right of domestic workers to organize.

We agree with the AFL-CIO that there must be an expanded program for economic development in the countries from which illegal aliens come. Only when the "push" factor of no jobs and low income in these countries is effectively dealt with can the problem of job-seeking illegal aliens be fully and finally resolve. Any program involving U.S. aid for economic development in these countries must, of course, make certain that jobs, wages, and working conditions in the United States are not lost or undermined as a result of such foreign aid or investment program.

We support the kind of U.S. aid to developing countries that increases job opportunities, raises workers' income, and lifts living standards for workers and their families. It is essential that U.S. aid programs help developing nations establish and strengthen free democratic institutions, including trade unions, and promote strong domestic economies with more income and buying power for workers and their families. Decent wages and decent working conditions and decent labor standards help develop the kind of economy that will provide jobs and income that will keep workers in these other nations from illegally seeking work in the U.S.A.

NEED FOR A PROGRAM TO ANALYZE LABOR NEEDS

The United Farm Workers Union opposes any program similar to the Bracero program which was in effect during World War II and for many years afterwards. The Bracero program under which large numbers of workers could legally come into the fields from Mexico made the organizing of farm laborers impossible until it ended in 1962. The Bracero program also destroyed the Mexican family base, exploited hundreds of thousands of workers, and was a black mark not only on our own labor history but on our relations with Mexico as well.

We wish to emphasize the fact that before any legislation bearing any resemblance to the Bracero program is seriously considered, there be a strong aggressive positive program to analyze farmworker labor needs, and place local workers in jobs in their respective communities.

Senator SIMPSON. Thank you very much.

I think it is important to note that we will have a full day of hearings on the issue of temporary worker programs, guest workers, on October 22. You will be interested, as we will, in that testimony.

Could you please share with the subcomittee your views on the Farm Labor Contractor Act? Has that worked well? If it has, we would like to know, and if not, why not.

Ms. BOWER. We feel that enforcement is the problem, and under our contracts we do not allow for labor contractors; the workers go through a hiring hall. So for our particular union that might be a stop-gap measure, but we do not feel that labor contractors should be in the picture at all. Where we have contracts, the workers go through hiring halls, and there is no person in the middle. I intend to submit some information on the Farm Labor Contract Registration Act—FLCRA.

Senator SIMPSON. Has that worked, though? Mr. Oswald, can you share with us whether the Farm Labor Contractor Act has worked, or is it unenforced or unenforceable, workable or unworkable? I think the subcommittee would be very interested.

Mr. OSWALD. Mr. Chairman, to the best of my knowledge the problem has been more lacking of plausible enforcement than the basic provisions. I would be happy to submit more detail for the record in terms of specific experiences and examples. But the basic attempts to assure certain safeguards for workers in terms of sanitary conditions and payment of wages has been an improvement over what existed before passage of that act; but in many cases there has been a lack of adequate funds to enforce the provisions that the act would provide for those workers who are not protected by the union contracts that are negotiated by the United Farm Workers.

Senator SIMPSON. It would be helpful, Doctor, if you would furnish us that material. That would be helpful for our background.

Part of the administration's program is additional INS and Labor Department investigators. How much more effective will be the administration's sanction program utilizing existing documents than say a program with an increased number of investigators but no sanctions?

[The requested material follows:]

ADDITIONAL VIEWS OF MR. OSWALD ON ENFORCEMENT OF FARM LABOR CONTRACTOR REGISTRATION ACT (FLCRA)

In the Annual Reports issued by the Secretary of Labor in the years 1977 through 1980 there were statements of the critical problems encountered in enforcing this statute and in the steps which were to be taken in each of the succeeding years to achieve a greater level of compliance.

Copies of an opinion letter issued by the Secretary of Labor on November 26, 1979 is shown below.

You will note that the opinion letter describes the problems which the Act was intended to correct and notes that new field instructions would be issued to insure that enforcement would be "Targeted on repeat and serious violations which jeopardize labor standards for agricultural workers."

U.S. Department of Labor,
Office of the Secretary
Washington, D.C., November 26, 1979.

Thank you for your letter of November 14, 1979, regarding the administration of the Farm Labor Contractor Registration Act (FLCRA). We agree that enforcement under the Act be targeted on repeat and serious violations which jeopardize labor standards for agricultural workers. To the extent that FLCRA enforcement has not been so targeted in the past, we are issuing field instructions to assure that there will be appropriate and consistent enforcement priorities.

As you know, FLCRA was enacted in 1963 to provide certain basic labor protection for migrant agricultural workers whose employment was dependent upon crewleaders. In hearings preceding passage of the Act, Congress found widespread abuses in this relationship. It found that migrant workers were not receiving proper pay, transportation or housing arrangements. Often these workers and their families were transported in unsafe vehicles and were misled about the job conditions to be found at the work site.

After ten years of experience under the Act, Congress determined that the abuses had not ended, and passed the 1974 FLCRA amendments to extend coverage and improve enforcement. The legislative history of these amendments indicates that although Congress extended coverage generally, it intended to exempt family farms and agriculturally related businesses (such as canners, ginners and packing shed operators) which "personally" recruited migrant labor for their own operation. Congress also exempted from coverage any full-time or regular employees of any incorporated farm or agricultural business if these employees only performed farm labor contractor-type activities on an "incidental" basis.

Consistent with this statutory language and legislative history, the Department has exempted family farms in which the farmer personally hires agricultural employees. We have also taken the position that the family farm does not lose the exemption for farm labor contracting activities done personally by the farmer and solely for the farm's own operation, simply because the farm is incorporated.

Even if the farmer does not personally perform those activities, the Department does not apply the act unless the farm has employees who engage in farm labor contracting activities on "more than an incidental basis." If the farm, whether incorporated or not, does not have any employee performing these tasks on more than an incidental basis, the statutory exemption from registration applies.

We believe, therefore, that FLCRA applies where there is a crewleader hiring or transporting workers or where there are company employees substantially engaged in activities generally performed by crewleaders. We also believe that it is critical to enforce the act in a way which discourages evasion of its provisions—to deter farm labor contractors from being placed on payrolls and appearing to assume the status of full-time or regular employees. This enforcement approach is consistent with both the letter and spirit of the act. It recognizes the classic farm labor contracting activities to which the Congress intended the act to be applied irrespective of the relationship (i.e., direct employee or independent contractor) between the farm and the individual performing farm labor contracting activities.

We recognize the concerns which have been expressed by farm operators, canners, packing shed operators, processors and others regarding the application of the act's requirements when they hire or transport agricultural employees directly through the use of full-time or regular employees of the company and where such employees do not spend a substantial amount of their working time in these activities. In this regard, we concur in their view that the Department may not have defined the term "incidental" as specifically as possible.

We, therefore, intend to adopt an interpretation of the term "incidental" that will include any full-time or regular employee of a farmer, processor, canner, ginner, packing shed operator or nurseryman who does not spend more than 20 percent of his time in farm labor contracting activities and performs that activity solely for his employer.

With this refinement of the definition of "incidental", we believe that in the great majority of cases, neither the corporate employer nor any of its employees will be required to register as a farm labor contractor.

We are also instructing our field enforcement staff to make certain that they concentrate on serious violations committed by traditional farm labor contractors who have repeatedly and seriously violated the act.

These administrative changes will clarify our enforcement position while at the same time preserving important protections for farm workers under the act. These include protections designed to generally prohibit convicted felons from being crewleaders; protections relating to housing and transportation safety; protections designed to assure workers of advance and continuing notice of wages, hours and working conditions and to assure that workers will receive prompt payment of wages.

Although the Occupational Safety and Health Act and the Fair Labor Standards Act provide coverage to farm workers in certain instances, neither statute affords farm workers the basic labor protections which are set forth in FLCRA.

The Labor Department owes farm workers, the Congress and employers a FLCRA enforcement program that concentrates on major violations and we appreciate your support in helping to make FLCRA work precisely as it was intended.

Sincerely,

—— ——

Secretary of Labor.

Mr. OSWALD. Well, investigators without sanctions will not do away with the problem. It is the jobs that are the attraction, and unless we have enough investigators and INS people around the border to put them shoulder to shoulder, you would not be able to stop the flood of illegals.

We do believe, though, that the INS operation does need to be beefed up in terms of its manpower. Clearly you have heard the examples of the number of INS agents as they compare to either the Capitol Hill police force or the Baltimore city police force in terms of their total numbers; and we believe that they do need to be beefed up even to make the employer sanctions, as well as border control, a viable element.

But we believe that the key is sanctions, because without the employer sanctions you will not really stop the flood. And for that reason we also believe in sanctions against employers who knowingly hire illegals and in injunctions as a means by which an employer can knowingly tell the difference, a good identification system.

Senator SIMPSON. Do you share with some members of the subcommittee who generally concur in the need for an employer sanctions provision—and I am thinking of myself—but who believe that it must be the type of program which does not place an onerous burden upon the employer with respect to what he has to do to avoid a penalty?

Mr. OSWALD. We believe that it should not be an onerous burden. That is why we believe that there needs to be a noncounterfeitable identification system in the long run, one that needs to be legislated now but obviously cannot take effect in 24 hours.

In the interim time period between the time it becomes fully effective, it makes sense to review the types of documents that the administration speaks about as identification.

One would assume that the employer currently fills out a W-4 form when a new employee is hired in terms of the number of dependents, et cetera, for the social security and withholding payment, and you could add a box saying has the employer reviewed some type of identification indicating citizenship of the new employee. So it would be a reminder to the employer that that is a normal means of processing a new applicant. We do not think that would be particularly burdensome.

Senator SIMPSON. The AFL-CIO executive council in August in their various proposals had a statement saying that the administration's proposal for civil sanctions where the employer has not acted in good faith relies on documents easily counterfeited and freely available for sale. These sanctions will not be even a minor inconvenience to those who hire illegal workers.

Is that still your position?

Mr. OSWALD. That is still our position. But you need to do something until you make the noncounterfeitable card an operational system. It seems to us that to say that in the 2 years or 3 years that it would take to develop a noncounterfeitable card system, we will not do anything is not a means of approaching the issue.

We have studied this issue, it seems to me, to death in terms of the attention we have given it. The Select Commission came to the same conclusion, I think, that these are not a secure means; and the prior testimony of Professor Fuchs essentially was the same, that it is an interim situation, but you need to move to the noncounterfeitable system so that the employer can proceed in a reasonable fashion.

Senator SIMPSON. You make the distinction in your testimony that you oppose any type of work permit such as is used in Europe. Would you state your definition of a work permit and why you are opposed to it?

Mr. OSWALD. Well, a work permit would imply something that would be granted for a particular job or could be withdrawn. We believe that the distinctions are that it must be a system that allows a person to have it for all time, that it cannot be withdrawn, that it cannot be used in a way as a sort of tracer of persons.

And I note that our May testimony before your committee heavily emphasized the notion that if there is some type of data bank that the Select Commission also talked about, which would not have addresses but would have something like the name of the mother or some other means of identification and date of birth, that these would be acceptable methods by which there would be protection of the person's background. But these are approaches we could take.

We believe that anything that allowed people to withdraw the work permit is one that would cause undue pressure on individual workers in a whole variety of fashions.

Senator SIMPSON. Well, I think it is very important to make that distinction for the record, because sometimes it is blurred in the discussion.

Ms. Bower, let me ask you what effect does the competition of illegal aliens have on the wages and working conditions of farm workers? And do you feel there are any alternatives to employer sanctions available which would achieve an adequate reduction in the number of illegal aliens employed in U.S. agriculture?

Ms. BOWER. The employment, the practice of bringing illegal aliens into the country has a very detrimental effect on the farm workers. The illegal aliens have been used to break strikes and for all kinds of reasons.

We feel that there are enough workers here in labor, enough people here now, as I stated in the testimony.

Senator SIMPSON. I was interested in that testimony. You say that there is an oversupply of farmworkers.

Ms. BOWER. Yes. There always has been in this country an oversupply.

Senator SIMPSON. How then do we continue to abide by the myth that there are not sufficient people in America to do these menial jobs, and therefore we must have an illegal flow or a legal flow or an H-2 flow or some kind of flow to do it?

Ms. BOWER. That is a very good question, Mr. Chairman. We know, for instance, that as I stated before, Puerto Rican workers were hired, were brought here to be hired to pick apples on the east coast several years in a row during the late 1970's and then were just left stranded in favor of bringing Jamaican workers over here.

We know that the American chicano population and black population in the Southwest and in Florida are upset because the jobs that they would like to have are going to illegal aliens.

So that if there is a problem, as you say, with getting workers, we feel that there definitely has to be a study made of this and some kind of positive program made to find workers in this country before we can say that there are not enough workers and that illegal aliens have to be brought in.

Senator SIMPSON. The figures that come to the subcommittee indicate that actually only about 15 percent even of Mexican illegal aliens go into agriculture. I think that is basically startling to most Americans. They believe as they think of illegal immigration that these people head for the agricultural jobs. That is not the case as we find it.

Do your studies bear out those figures?

Mr. OSWALD. Yes. Often the discussion is that they are working for less than the minimum wage and that somehow increased minimum wage enforcement officers will take care of all the problems. There are a number who clearly do work for less than the minimum wage, but the majority—some recent studies indicate 60 percent or more—are well above the minimum wage, but in many cases still at wages that are below those that would prevail for other American workers performing those same activities.

In some cases they are clearly exploitable in terms of specific kickbacks to particular employers, so that while the wage may appear to be higher, there are under-the-table payments to protect their illegal status.

Senator SIMPSON. I think another misconception is that of the illegal alien flow other than the one I have just stated as to 15 percent is that somehow the vast majority of those illegal immigrants are Hispanic. Certain studies indicate that a significant number are nonhispanic.

Do your figures and studies bear that out?

Mr. OSWALD. Yes, they do, Mr. Chairman. And many of the illegals are not just those that are coming across the border from Mexico. They come either as students or as visitors or by other means, but they just never leave the country, and their illegal activities are really enhanced because they are able to get jobs here which are better than those in their home country, and therefore they stay.

[The requested material follows:]

ADDITIONAL VIEWS OF MR. OSWALD ON THE UNDERGROUND ECONOMY

Questions were also raised about the Underground Economy. The New York Times of March 16, 1980 carried an article by Terri Schultz, Assistant Professor of Journalism at New York University—The Untaxed Millions.

Reference is also made to How Big is the Irregular Economy?, an article by Edgar L. Feige in the November-December 1979 issue of Challenge and to Statistical Illusions, Mistaken Policies by Peter M. Guttman, which appeared in the same issue of Challenge.

Senator SIMPSON. Let me ask you, Ms. Bower. I am sure that in your organization that there are many Hispanic members. Do the Hispanic members of UFW fear that discrimination against them might result from any kind of an employer sanctions law?

And the second part of that, even though it will come Friday with more particularity: If that same discrimination would come from use of an identifier system?

Ms. BOWER. Yes, Mr. Chairman, they do. This has been a very sensitive issue in the United Farm Workers. That is why we really feel that the social security card would be the way; if each worker were issued counterfeit-proof social security cards, such as other workers are, that this would tend toward letting these Hispanics have the kind of upward mobility that the rest of us have, include them in the system. And other forms of identification, we feel, could be very discriminatory.

Senator SIMPSON. Do you have any comment about that?

Mr. OSWALD. I am in perfect agreement that we need a system that allows all workers, regardless of their surnames, their ethnic backgrounds, to compete equally. And because of that, we need a system that does not say you, because you have a surname that is Spanish, must produce a type of identification that would be different from other workers, we strongly believe that something like a counterfeit-proof social security card, that is required of all workers currently when they apply for a job, except that it is not counterfeit-proof currently, is the answer to a means of providing that sort of identification.

Senator SIMPSON. I think that that in itself is another misconception, that somehow a new identification system would be something that would promote discrimination. At no time has the Select Commission or this subcommittee ever discussed any type of identifier system, whatever we may arrive at, that would not be required to be presented by all new hire participants.

I think that is a very important point. I keep emphasizing it because I have learned in this game that there is no such thing as repetition. It is something that will be part of the final package. If it is not drafted that way, it will not be part of the final package. So I think that is very important to reflect on.

Dr. Oswald, you state in your testimony that some employers avoid the legal responsibilities to withhold and pay to the Government income and social security taxes and unemployment insurance payments. Do you have any estimate at all concerning the proportion of illegal alien workers who are employed by such persons?

Mr. OSWALD. No, Mr. Chairman, we have not been able to shed any more light on that issue than some of the attempts by the

Commission to look into that. Since it is an underground economy, it is one that is very difficult to identify.

There are growing studies by a variety of academics and others in terms of the underground economy, indicating that it is much larger than we had ever thought of before, where employers are not withholding taxes and unemployment insurance and social security benefits, except that all of those are various estimates.

Some of that applies, of course, to legal U.S. citizens as well, but obviously illegal aliens are much more susceptible to that type of exploitation and manipulation. There have been various studies by some of the professors at NYU and others on the underground economy, that I would be happy to submit references on that overall problem to the committee.

Senator **Simpson**. My hunch is that the staff may have seen that, but get it to us because I have four very bright people who just love to churn around that type of thing. Not I, but the subcommittee has.

Some critics of employer sanctions believe that simply a vigorous enforcement of labor laws would by itself adequately solve the illegal alien problem. What is your view of that?

Mr. **Oswald**. Not at all, Mr. Chairman, because the current labor laws only deal with massive deviation from what are minimum standards in this country in terms of minimum wage and hours of work. Many of the illegal aliens are paid more than the minimum wage. The estimates are close to 60 percent.

So that enforcement of the minimum wage law itself would not at all be the major deterrent. As a matter of fact, the minimum wage in the United States governs the wages of only approximately 5 percent of all workers. So that we are talking about 95 percent of the workers who are paid more than the minimum wage in this country but who are being adversely affected in their overall wages and working conditions by the presence of the illegal aliens who are being exploited by employers in a way that they cannot abuse U.S. workers.

Senator **Simpson**. Are you aware—I am sure you are—and I think there was discussion of it this morning when we were talking about the displacement factor—of the recent apprehension of illegal aliens in Illinois where there were these job vacancies suddenly created, I believe the figure was 31, and there were some 300 American citizens who applied for those jobs? The jobs ranged in hourly wage from $4.15 an hour to over $12 an hour.

Do you think that is a prevalent thing? If we were to pursue it, do you think we would find more of that or less?

Mr. **Oswald**. Well, Mr. Chairman, we would find more of that. And we have had many examples in the last few years where we have had thousands of workers line up for a few jobs at decent wages when there is public announcement of those jobs.

Less than a year ago there were a few jobs advertised in Baltimore, about 100 jobs, and by the end of the day over 3,000 people had applied for those jobs. In one of the rubber companies recently, they expanded hiring and a few thousand people lined up.

One of the few States in which currently there has been some sort of a labor shortage at all has been your own State, Mr. Chairman. But in terms of most of the areas where the illegal problem is most prevalent, in the major cities and much of the Southwest, we have very high levels of unemployment and more than a willingness of U.S. workers to take the same types of jobs.

Senator SIMPSON. Yes, that is of interest. In the State of Wyoming because of the energy boom in oil and gas and coal, there has been a rather low unemployment compared to other parts of the United States. And yet, apprehensions are made there—significant amounts. Significant numbers of illegal aliens are found to be working in the oil industry, and in the construction trades.

The nationwide figures that we continue to review on that show that over 30 percent of illegal aliens will be in the assembly line type of activity or job opportunities of that nature, which is I think surprising, being just as surprising as the figure that only 15 percent go into agriculture.

Mr. OSWALD. Mr. Chairman, in our building trades unions we have a regular process of referring them to where openings may be in other States as well as their home area, and it has been a tradition where we have sent workers to build our huge dams in the West from various parts of the country. And many of the same booms that exist in terms of mining and oil exploration in Wyoming are similar to those we have manned before with American skilled and unskilled construction workers in those areas.

One of the unions I was associated with before, the Service Employees International Union, represents very many unskilled workers, janitors, and others. And there has never been a problem of an adequate willingness of American workers to do the most menial of some of the janitorial type tasks and others. So that across the board there has been a willingness.

In some of the assembly line activities, we have gone out of our way to do outreach programs in some of the minority communities to make sure that some of the younger minority workers who have not had types of work experience before or have not had a family history of work experience would be brought into those assembly line operations. And we have had substantial success in making those jobs a new entry for people who have not had work experience before.

If we cut it off for them with illegal immigrants taking those jobs, I think we have defeated the problem, that we need to provide meaningful jobs for most Americans.

Senator SIMPSON. Let me ask you as we wind down here, and we will do that in a moment: You both have had a significant experience in the labor movement and the employment market and job opportunity programs and employer-employee relations. How do you believe that we have come to this, which is I think the greatest misperception of the entire scope of the issue, that these people are taking jobs that Americans will not perform under any circumstances. How did we get to that point in our national mythology? And apparently it is a myth, according to you—and you have been deeply involved in the labor movement.

What is your view of the reason for that?

Mr. **Oswald**. I think something that is repeated often enough takes on a life of its own, whether there is any support for that type of concept. I think the other reason is that so few people have really studied the issue, and they have a stereotype of who an illegal immigrant worker is, rather than a real study of what are the actual practices of such workers.

And any study of the actual practices in job recruitment indicates that American workers do take those jobs, perform those jobs, the illegal immigrants are essentially taking the same types of jobs performed by American workers.

Senator **Simpson**. Do you have a comment on that, please?

Ms. **Bower**. Yes. I would just simply agree with what Dr. Oswald just said. There are American workers to do the jobs, even the farmworkers. I remember a case a couple of years ago where Cesar Chavez had talked to a black farmworker in Florida who was so proud of the fact that he had picked the food that we ate. And the people really do—the American farmworkers really do see dignity in the job that they do.

And I do not know how this misconception came to be, because that is not what we have found in our union. We have found that there are American workers that do want to do this work.

Senator **Simpson**. And even though you obviously do not represent nonunion American citizens, you would find that to be the case with that group too, would you not?

Mr. **Oswald**. Yes, and the occupations are essentially the same. We represent workers in all types and classes of occupations, from unskilled to very skilled to professional. And the experiences are relatively the same in terms of the willingness to accept jobs. Differences in that some workers join together to form unions to improve their condition through the union movement, but the workers are essentially the same.

Senator **Simpson**. Thank you very much for your very important testimony in our hearings. We will now recess. I thank you very much, Dr. Oswald and Ms. Bower. We will recess until 1:45. We will begin promptly at 1:45, with the business panel.

Thank you very much. I appreciate it.

[Recess.]

AFTERNOON SESSION

Senator **Simpson**. The hearing will come to order.

I hope we have expanded the seating capacity a bit. If we did not, we will get another row of chairs back there before Friday's hearing. And we did scratch two tables, so we are making progress.

Let me announce that this is the business panel. One of the panelists just contacted us last evening, Mr. Thompson, who is the southeastern regional vice president of the board of directors of the U.S. Chamber of Commerce and chairman of their labor relations committee. There was a death in his family and we were not able to obtain an appropriate substitute. We send our condolences to him. His testimony will be entered in the record and become a part of the record.

[The prepared statement of Mr. Thompson follows:]

STATEMENT
on
EMPLOYER SANCTIONS
submitted to the
SUBCOMMITTEE ON IMMIGRATION
of the
SENATE JUDICIARY COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Robert T. Thompson
September 30, 1981

I am Robert T. Thompson, senior partner in the law firm of Thompson, Mann and Hutson of Washington, D.C. and Greenville, South Carolina. I am also Regional Vice Chairman of the Board of Directors of the Chamber of Commerce and serve as Chairman of the Chamber's Labor Relations Committee. With me today is Christopher Luis, a labor law attorney with the Chamber.

The U.S. Chamber of Commerce is the largest federation of business and professional organizations in the United States, and is the principal spokesman for the American business community. It represents over 174,000 business firms, 2,700 local and state chambers of commerce, and 1,300 trade and professional associations.

The Chamber commends this Committee for trying to come to grips with the difficult national issue of illegal immigration. The business community likewise has genuine interest in the development of a sound, rational immigration policy. We also commend the Reagan Administration for its efforts to find a solution to this vexing problem.

We welcome this opportunity to offer constructive criticism and to articulate the problems which we believe could arise from the adoption of an employer sanctions proposal.

The Chamber forsees potential serious consequences from the enactment of an employer sanctions law. Such a proposal must not be based on misinformation and frustration, but rather should be advanced only if it is workable, reasonable and, truly needed.

We do not condone the practice of knowingly hiring illegal aliens. Many businesses already have internal policies which restrict hiring to U.S. citizens or permanent residents. Our serious reservations concerning an employer sanctions law are not premised on its intent or objectives -- the control of illegal immigration. Rather, it is the likely undesirable effects of such a proposal that gives us pause.

THE UNITED STATES WILL ALWAYS ATTRACT IMMIGRANTS

There are many reasons why people migrate: wars, natural disasters, tyranny and persecution, or simply to improve living standards. Thus, the phenomenon of migration can be reduced to natural "push and pull" forces. Unfavorable living conditions "push" natives out of a country or region while favorable living conditions "pull" them into another country or region. International migration will continue as long as those conditions exist.

The favorable living conditions in the United States in contrast to unfavorable living conditions in other countries have always acted as a natural "pull-factor." Simply stated: since its beginning, the United States has developed as a nation of immigrants.

A spokesman for Japan's foreign ministry [1] recently explained why the overwhelming majority of Indo-Chinese refugees leave Japan as soon as possible:

> The problem is that almost all the refugees want to go to the U.S.: the U.S. is the symbol of civilization, prosperity, liberty, and everything to them.

Thus, while it is true that some illegal aliens come to the United States in search of employment, this does not justify making U.S. employers responsible for policing our immigration laws. If there is a need to find a scapegoat for illegal immigration, a more appropriate target would be our nation's economic opportunities and guaranteed personal freedoms. We should be proud of that.

EMPLOYER SANCTIONS LAW IS BASED ON NATIONAL FRUSTRATIONS

Our system of law provides for the orderly processing of individuals seeking to enter the country. When others break the law by entering without permission (illegal border crossing) or by fraud (false statements on tourists' visas, etc.), it naturally arouses anger among our citizens.[2] This law breaking tends to draw the whole immigration process into disrepute.

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[1] September 2, 1981 issue Wall Street Journal, "Japan's Refugee Problem."

[2] There are three types of individuals who enter this country outside normal immigration procedures. These are: (1) refugees who are fleeing oppression; (2) undocumented workers who come to work; and (3) "True" illegal aliens who overstay their visa time limits or who wish to be with family without going through proper procedures. Since an employer sanctions law would only address undocumented workers, we limit our testimony to this issue.

Concurrently, when unemployment is high, the desire to exclude illegal aliens reaches frustrating levels.

Consequently, it is not surprising that proposals to impose sanctions on employers that hire illegal aliens attract popular attention.

It has been an almost universal rule of history that, in times of economic difficulties, countries turn inward and express increasing hostility to foreigners and the foreign-born.

Knowledgable observers recognize that waves of immigration enforcement fever follow the ups and downs of the U.S. economy rather closely. Public demand for congressional action and for strict immigration law enforcement rises with the unemployment rate. Yet, an employer sanctions law would not have stopped the Indo-Chinese refugees or the Cuban boat flotilla. They came as political refugees, not to seek a job.

Despite the fact that employer sanctions is not a new proposal, there have never been accurate statistics developed on the number of undocumented workers, what type of jobs they hold, whether American citizens are available to take the jobs and the economic consequences of such a program.

Although this lack of data would be sufficient to warrant caution in proceeding to such a proposal, this is not our principal concern. The proposal is premised on shifting to private citizens the responsibility to uncover illegal aliens. There is no rational justification for such a massive transferring of law enforcement duties from the federal government to private citizens. The proposal would require 106 million American workers to prove their citizenship and could place an unworkable burden on employers to confirm the citizenship status of these workers.

BASIC ARGUMENTS OFFERED IN SUPPORT OF EMPLOYER SANCTION LAW IGNORE FACTS

There are three primary arguments offered on the need to enact an employer sanctions law. These are: (1) employers intentionally recruit and prefer undocumented workers to American workers; (2) employers are exploiting undocumented workers at these jobs and this practice must stop; and (3) undocumented workers are holding jobs which would otherwise go to American citizens.

We submit that these premises are unsound.

FEDERAL LAWS PROHIBIT RECRUITMENT OF UNDOCUMENTED WORKERS

The vast majority of businesses do not intentionally recruit or in any manner engage in acts to break the immigration laws. Furthermore, there are already three Federal laws which are designed to discourage this activity:

- Section 274 of the Immigration Act - prohibits the smuggling, transporting or encouraging of illegal entrants into this country. Violators are subject to a $2,000 fine or 5 years of imprisonment or both for each alien involved.
- Section 6(F) of the Farm Labor Contractor Registration Act of 1963 makes the recruiting or contracting for work of illegal aliens subject to a fine of $10,000 or a 3 year prison sentence or both.
- Sections 275-276 of the Immigration Act provide for up to a $2,000 fine or 5 years imprisonment for aliens entering the country illegally. An illegal alien who accepts employment would thus be subject to criminal and civil penalties and is prohibited from applying for legal immigrant status in this country.

UNDOCUMENTED WORKERS ARE COVERED BY U.S. LABOR LAWS

Another misconception concerning undocumented workers is that they do not have the protection of U.S. labor laws. But, the minimum wage and overtime laws apply to all workers in the country, regardless of their citizenship status. Likewise, the Occupational Safety and Health Act applies to all workplaces regardless of whether undocumented workers are employed.

An understanding of the Fair Labor Standards Act and a review of government studies disprove claims that undocumented workers are exploited.

Several industries, notably agriculture and restaurants, are exempted from full coverage of the minimum wage laws and are popularly known to hire undocumented workers. Workers in these industries are provided other forms of compensation in lieu of a minimum wage. Usually, these include transportation, living quarters, and meals.

Agricultural workers are paid a certain minimum and then are paid depending on the number of items picked (paid "by the piece"). This exemption has a long and stable history, and has permitted meaningful employment.

Some restaurant workers are also exempt from full coverage of the minimum wage. These workers are provided free meals and a substantial part of their income comes from gratuities, a portion of which is credited against their basic wage. It is quite usual for a restaurant worker to be paid less than the minimum wage, but with tips have a weekly income substantially above what the minimum wage would pay.

Thus, although there are industries which technically pay below the minimum wage, they are nevertheless paying the legal wage and actual earnings by the worker can be quite high.

In 1977, Congress appropriated funds for an additional 260 Department of Labor (DOL) enforcement officers to conduct a program aimed at employers in low-wage, high-turnover industries where DOL believed minimum wage and overtime violations and employment of undocumented workers existed.

The program's purpose was to eliminate the employers' "economic incentive" to hire undocumented workers by enforcing wage and hour standards.

In a January 1981 report, the General Accounting Office noted that this program by the Labor Department was a failure since "the assumption that employers are exploiting undocumented workers is not generally valid." The report also noted that employers that do hire undocumented workers usually pay at or above the prevailing wages in the area.[3/]

Another report, issued by the Minimum Wage Study Commission in May 1981, showed that over 95% of all business firms are in complete compliance with all provisions of the wage and hour laws. These firms employ 98.8% of all covered workers. Of those who are in violation of the law, few are deliberate or willful violators. Most are in violation of the technical aspects of the law.[4/]

These reports further corroborate the fact that there is no concerted exploitation of undocumented workers.

The National Labor Relations Board and federal courts[5/] have also consistently ruled that undocumented workers are protected under the National Labor Relations Act. Undocumented workers may vote in union certification elections and receive all the protections of the labor laws, including full union membership rights.

[3/] Administrative Changes Needed to Reduce Employment of Illegal Aliens, GAO Report HRD 81-15

[4/] Report of the Minimum Wage Study Commission, Vol. I., May, 1981.

[5/] See NLRB v. Sure-Tan, Inc. 583 F.2d 355 (7th Cir. 1978); and 10 Rutgers-Camden Law Journal 747 (1979).

UNDOCUMENTED WORKERS DO NOT CAUSE UNEMPLOYMENT NOR DO THEY DEPRESS WAGES

The final and most widely advanced argument to justify employer sanctions is that undocumented workers are holding jobs which deprive American citizens of work, thereby fostering high unemployment.

Unemployment is caused by unfavorable economic conditions, not by individuals. There is no evidence to show that undocumented workers take jobs away from U.S. citizens. Indeed, undocumented workers may boost the economy as a whole, and, if they do, the chances are that all workers will benefit, including those who are presumed to be competing with the undocumented workers for jobs.

A comparison of data supplied by the DOL's Bureau of Labor Statistics (BLS) and by the Immigration and Naturalization Service shows that there is no correlation between undocumented workers and the unemployment rate.

Although the nation's overall, unadjusted unemployment rate for July 1981 was 7.7% (See Charts 1 and 2)

- in 20 cities with a high concerntration of undocumented workers, the unemployment rate was 7.17%, and
- in 10 states with a high concentration of undocumented workers, the unemployment rate was 6.87%.

These figures are in sharp contrast to

- 20 cities with little or no concentration of undocumented workers where the unemployment rate was 10.9% and
- 10 states with little or no concentration of undocumented workers where the unemployment rate was 9.41%.

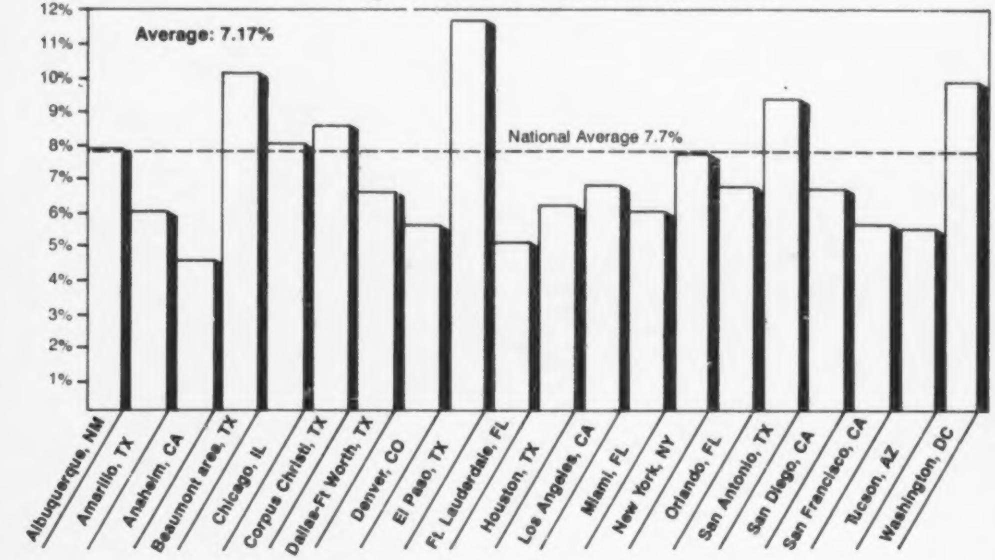
In addition, although the 1980 national unemployment rate for blacks stood at 13.2%, and for Hispanics at 10.1%,

- in cities with a high concentration of undocumented workers, the black unemployment rate was 10.7% , and
- in cities with a high concentration of undocumented workers, the Hispanic unemployment rate was 9.6%.

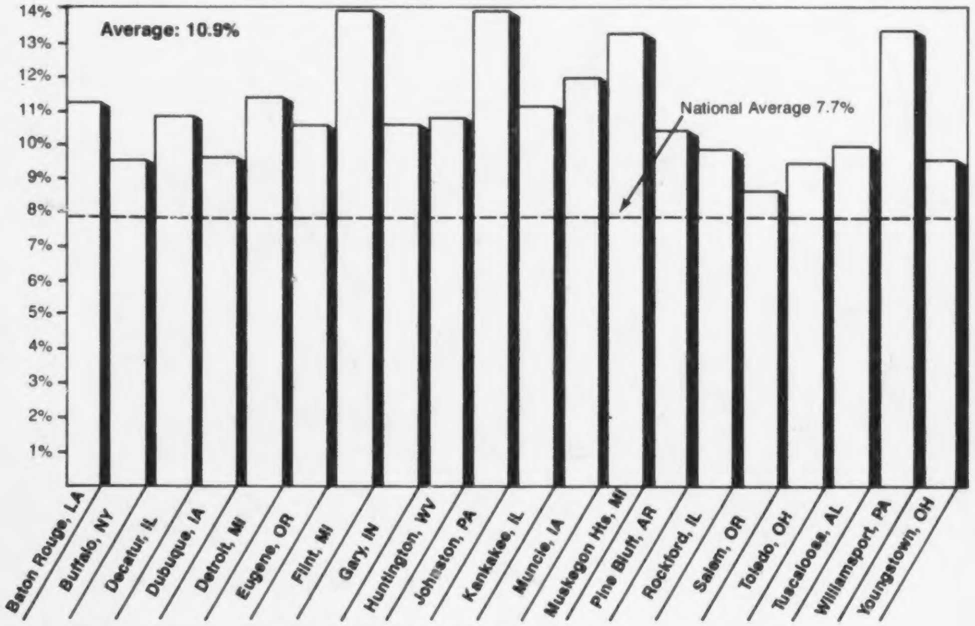
Graph I

UNEMPLOYMENT RATE AND UNDOCUMENTED WORKERS
July 1981

Cities with a High Concentration of Undocumented Workers



Cities with a Low Concentration of Undocumented Workers

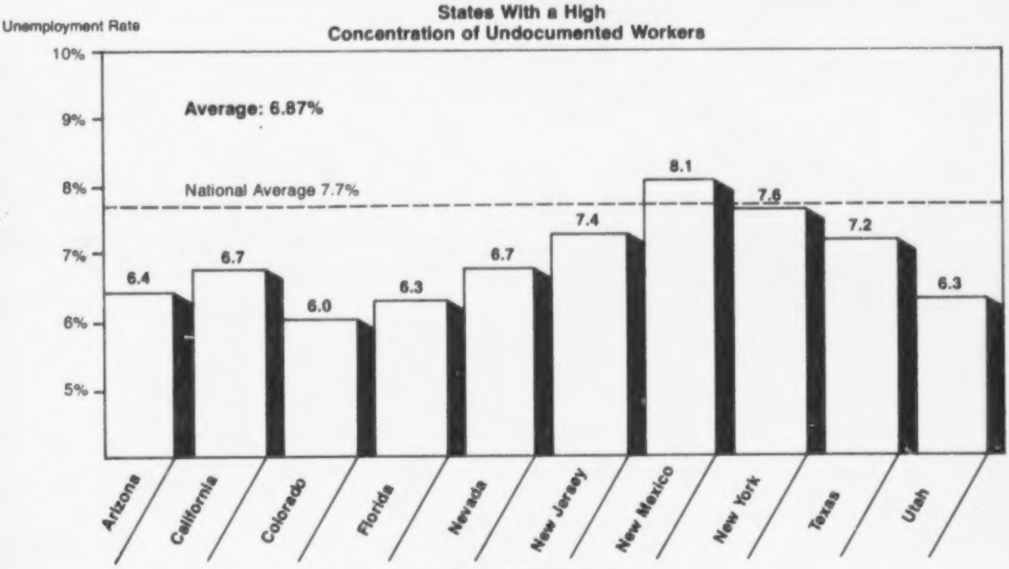


Sources: U.S. Department of Justice and U.S. Bureau of Labor Statistics

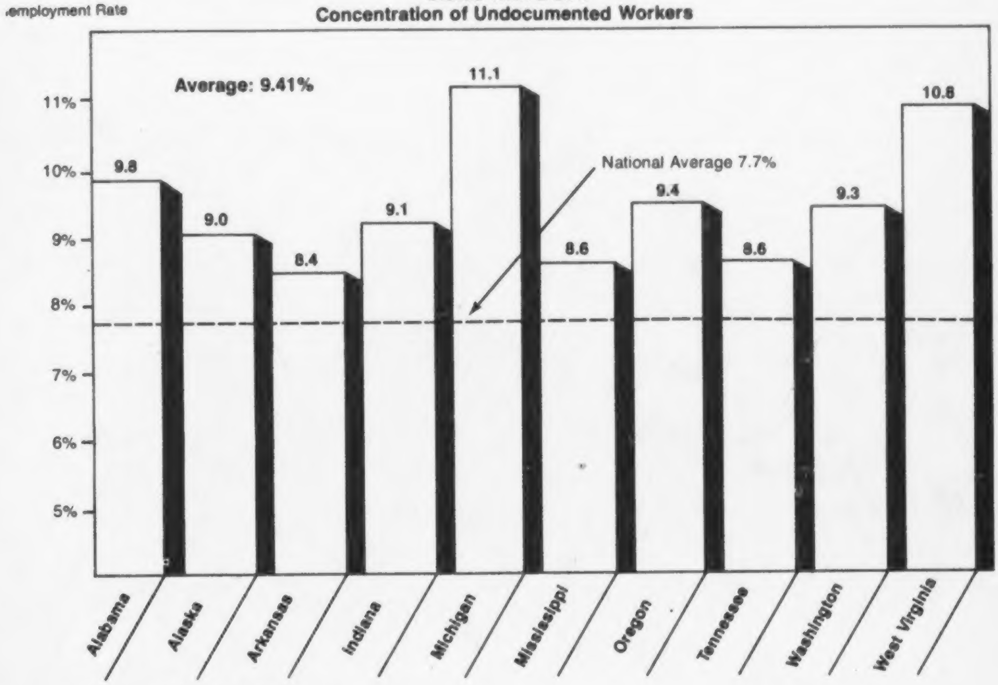
Graph II

UNEMPLOYMENT RATE AND UNDOCUMENTED WORKERS
July 1981

States With a High Concentration of Undocumented Workers



States With a Low Concentration of Undocumented Workers



Sources: U.S. Department of Justice and
U.S. Bureau of Labor Statistics

These figures are in sharp contrast to

- the cities with little or no concentration of undocumented workers where the black unemployment rate was 14.9%.

These comparisons reveal an astounding statistic. In the cities with a high concentration of undocumented workers: the overall unemployment rate is 7% lower than the national average; the black unemployment rate is 22% lower than the overall black unemployment rate; and, the Hispanic unemployment rate is 5% lower than the overall Hispanic unemployment rate. (See Tables I through IV in Appendix).

Although these figures suggest favorable employment-economic consequences, we will conclude only that there is no correlation between the unemployment rate and undocumented workers.

There is another revealing government statistic which merits consideration.

The states with high concentration of undocumented workers also are the states with the highest annual employment growth rate (states where jobs are quickly expanding).

For instance, 8 of the top 10 growth states are those states with a high concentration of undocumented workers. (See Table V in Appendix).

Thus, although the national employment growth rate for the past twenty years was 2.2% (2.2 jobs open per year for every 100 jobs existing)

- in 9 states with a high concentration of undocumented workers, the employment growth rate was 4.3% (with New York State (3.94%).

The employment growth rate in states with a high concentration of undocumented workers was almost double (97% higher) the growth rate for the rest of the country.

These figures suggest that undocumented workers flock to areas of low unemployment (workers are scarce) and of high employment growth (jobs are plentiful).

Thus, not only is there no proof that undocumented workers take jobs away; the figures suggest the opposite.

A related argument is the claim that undocumented workers depress the wages in the area where they work. Yet, four separate academic studies [6/] have concluded that undocumented workers do not depress wages but rather earn somewhere within the prevailing wages in an area.

This observation is also confirmed by government studies. The January 1981 GAO report concluded that most employers that have documented workers pay at or above prevailing minimum rates. And, figures provided by the BLS show that there is no correlation between average wages earned by American workers and a concentration of undocumented workers. (See Table VI in Appendix).

In summary, government data shows that undocumented workers are clustered in areas of high employment growth and a low unemployment rate. These undocumented workers have little impact on overall wage rates and enjoy the protection of U.S. labor laws. This data refutes the primary arguments advanced in favor of an employer sanctions law.

PROBLEMS OF AN EMPLOYER SANCTIONS LAW OUTWEIGH ANY POTENTAIL BENEFITS

The fundamental issue posed by an employer sanctions law is, how does the employer determine who is legally in this country and who is illegally in this country?

In this regard, there are two prominent proposals for an employer sanctions law. One was announced last June by the Administration. The other was introduced by Senator Huddleston and others as S.776, the Immigration and Nationality Security Act of 1981.

The Administration's proposal for an employer sanctions law has three elements:

- Civil fines would be imposed on employers (of at least four workers) with a pattern or practice "of hiring undocumented workers."

[6/] Undocumented Immigration from Mexico: Research Report," International Migration Review 149-177 (1978) J. Bustamante; Las Animas: A Village of Migrants (unpublished paper, Department of Agriculture and Resource Economics, University of California, Berkeley, 1977) by G. Mines; Depressed Wages Along the U.S. - Mexico Border: An Empirical Analysis, Economic Inquiry, Vol. XV (January, 1977) by Barton Smith and Robert Newman; Manpower Impact and Problems of Mexican Illegal Aliens in an Urban Labor Market, (the San Antonio Study) (University of Illinois Center for Advanced Computation, December, 1976) by Gilbert Cardenas.

- Legal status would be proven by the employee submitting documentation provided by INS, or any two of the following: birth certificate, driver's license, social security card or draft card.
- For every employee hired, the employer would submit to the Federal government a certified statement of compliance.

Although we commend the Administration for its comprehensive approach to this complex issue, its employer sanctions proposal would create serious problems for American workers and employers.

It would require that employers have "no reason" to believe that the employee is not a lawful resident. This would create a practice of "safe hires" which would directly increase the appearance of discrimination or discrimination itself. For example, an employment decision might be influenced by accents, surnames or other easily noticed characteristics. Additionally, these documents which potential employees would be required to produce are readily forgeable or easily obtainable.

A 1977 GAO report [7] noted that the federal government has no control over the use of illicit documents. Social Security cards,for instance, are obtained through fraud, administrative errors, and the disinclination of administering agencies to question applicants' legal status.

On September 8, 1981, the GAO again noted that social security cards are "commonly" counterfeited or stolen by persons illegally in this country or by U.S. citizens receiving unearned benefits. Cards are often "peddled" by federal employees. The report also noted that one recent spot check showed 3 million persons with two cards working under one number while receiving benefits under the other.

Officials from the past several Social Security Administrations have stated that it is impossible for them to verify the legal status of every applicant for benefits or for documents. Yet, under the Administration's approach this impossible task would be required for employers.

7/ Impact of Illegal Aliens on Public Assistance Programs: Too Little is Known, GGD 78-80, December 1, 1977.

The other documents are also easily obtainable. Birth certificates can be obtained through fraud or by illegal production. In certain states, illegal aliens can legally obtain a driver's license. And, applicants do not have to prove citizenship status to obtain a draft card. Documentation issued by INS is also easy to obtain and easy to forge.

S.776, in its enforcement scheme, raises an additional -- and highly controversial -- element.

IS A NATIONAL I.D./WORK PERMIT CARD REQUIRED FOR AN EMPLOYER SANCTIONS LAW?

Because of the significant shortcomings of any other type of system, it would appear that some form of national identification and work permit system is a prerequisite for an enforceable employer sanctions law. A comprehensive approach is outlined in S.776. This bill would provide for:

- Civil and criminal penalities for employers hiring undocumented workers.
- National I.D./work permit card for U.S. citizens and permanent residents legally in the workforce.
- A federally run, computer data bank system to determine worker eligibility.
- A reporting system to provide verification of employment (i.e. employers would call a centralized government office before hiring a prospective employee).

The sponsors estimate the cost for starting this program at about $1.553 billion (approximately $1 billion for I.D. cards and $.553 billion for verification costs).

We submit these figures are inaccurate. For instance, the sponsors suggest that since there are 15 million new job hires every year,[8] the federal government will have to verify the status of only 15 million workers per year. The cost for verifying the status of these workers is estimated at $.553 billion. This calculation is incorrect. The exact number of total hires for our workforce is not known, but clearly exceeds 15 million by a wide margin.

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[8] See also Keeping Undocumented Workers Out of the Workplace: Costs of Alternative Work Permit System by David North, May 1979; and Fact Sheet to accompany S.776.

The manufacturing industry, perhaps our most stable in terms of labor turnover, has 21 million workers with an annual turnover rate of about 50%. In other industries the labor turnover rate can be significantly higher. Construction, with 6 million workers, is a "project oriented" industry. It is common that the same worker be employed with several different contractors. A "labor turnover" rate of over 500% would not be unusual. The relatively small number of 6 million construction workers can translate into 30 million different annual hires.

A national labor force of 106 million workers can easily be translated to a labor turnover rate significantly above this figure. Based on limited information, the U.S. Bureau of Labor Statistics speculates that a labor turnover rate of 70 million annually may be minimum.

We suggest that the $553 million estimate (based on 15 million workers) in the bill would have to be multiplied by as much as 4.6 times (based on 70 million workers) to provide a more accurate figure.

Thus, the $553 million figure for a start-up cost could be $2.5 billion.

This $2.5 billion start-up cost would be added to the estimated $1 billion figure for the printing of a National I.D. Card. (The bill's sponsors, in order to keep the costs down, suggest that American workers pay up to $10 each for obtaining their card). So at the minimum it will cost $3.5 billion.

If past government cost estimates for adopting a "fool-proof" card are any indication then we can reasonably expect that there will be substantial cost overruns.

For instance, in 1977, the INS adopted a program to make a "fool-proof alien registration card" (the I-151 card or "green card" - the document which permanent resident aliens must carry).

This new counterfeit-proof card was estimated to cost $13 million and have a 7 year implementation plan.

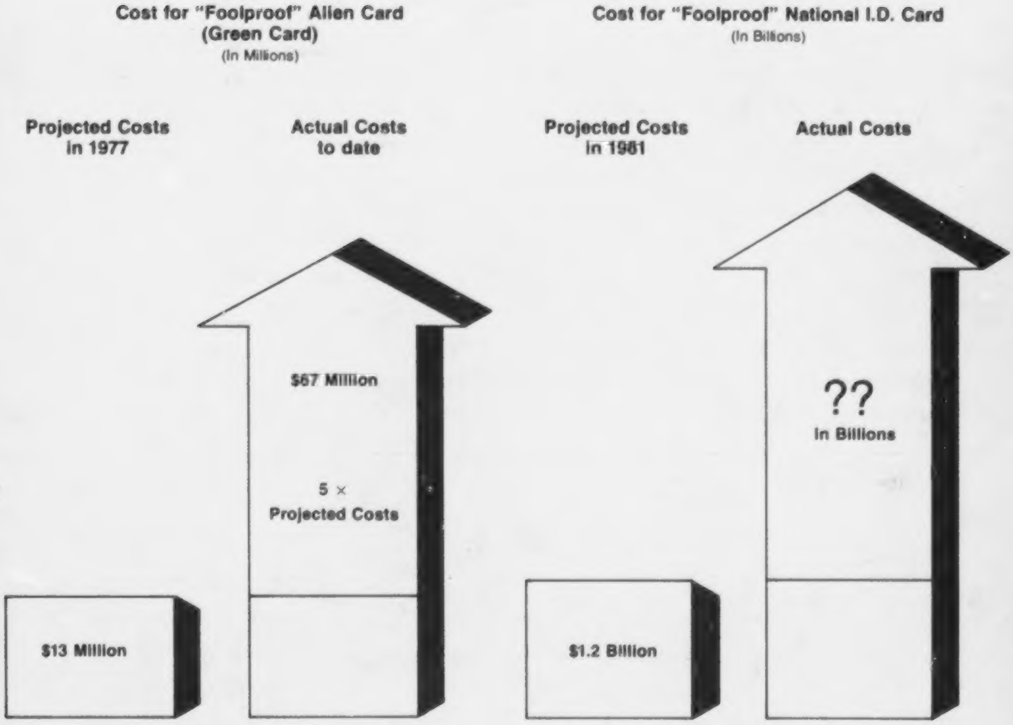
As of November 5, 1980,[9] the card was behind schedule and cost estimates had increased to $67 million, a five-fold increase in three years.

This program, far from producing a counterfeit-proof card, has created unexpected cost overruns and has created confusion. The alien registration "green card" is not green, but comes in a blue or a pink color. (See Chart 3).

9/ See GAO Report GGC 81-4, November 5, 1980.

Graph III

COST COMPARISON
FOR A NATIONAL I.D. CARD SYSTEM



"Green Card" Contains:

picture of holder
registration number
vital statistics
fingerprints

Note: Incidentally, Green Cards are not green, but are blue or pink.

National I.D. Card Would Contain:

picture of holder
identifying number
vital statistics
fingerprints?
one color?
other identifying features?

Source: GAO Report GGD-81-4, November 5, 1980, and statement by Attorney General of the U.S.

This is what has happened when the government attempted to issue counterfeit-proof cards to 4.5 million permanent residents. Imagine a similar senario for the 106 million legal working American citizens, or perhaps all 230 million Americans. It would be chaotic.

Aside from the unknown billions in cost for such a program, even its proponents concede that such a system will not be perfect.

Indeed, counterfeit-proof cards seem impossible at best. Providing an effective fool-proof employment verification system is equally impossible. It would be obsolete the moment it was completed. It would require a federal bureaucracy larger than anything tried to date; as a comparison, the total number of medicare and social beneficiaries. equals 60 million individuals -- the total number of individual federal income tax returns equals 90 million. A National I.D./work permit card system would affect all industries, all businesses, all jobs, all employees, and have no guarantee of success.

The cost impact alone that this approach would have on the federal budget may merit its rejection.

EMPLOYER SANCTIONS LAW IGNORES HISTORICAL PATTERNS AND DISREGARDS IMMIGRATION PATTERNS

A leading proponent [10/] of an employer sanctions law concludes that such a law "will not accomplish much." Professor Briggs notes that:

> "it is very doubtful that many juries would convict an employer for the offense of providing jobs to anyone. With court dockets already backlogged with serious crimes, it is hard to imagine that many employers would ever be brought to trial ... As meaningless as such a ban may prove to be, nothing else makes sense until such a law is on the books."

An employer sanctions law would address only part of the illegal alien problem. Studies have indicated that undocumented workers represent between 42% and 74% of the entire illegal alien population. In theory, the U.S. would have to close its borders and turn people away at our ports if we were to control totally our immigration.

Those who advocate employer sanctions to stem the tide of undocumented workers disregard established theories for immigration and ignore long-standing historical patterns.

[10/] See The Problem of Illegal Immigration by Vernon M. Briggs, Texas Business Review, Vol. LI, No. 8.

The push factor will remain in other countries and the U.S. will continue to pull people.

DO UNDOCUMENTED WORKERS PLAY A POSITIVE, PRODUCTIVE ROLE IN OUR NATION?

Although we certainly do not advocate the hiring of undocumented workers, there is some evidence to suggest that the effects of undocumented worker employment have not necessarily been negative.

Data shows that undocumented workers are concentrated in unskilled, high turnover jobs, in areas of high-growth and a low unemployment rate. This would indicate that there is a positive force.

Government officials in the two states with the highest concentration of undocumented workers have also confirmed this view. Governor Jerry Brown of California noted that a number of industries in his state could not function without undocumented workers. Grace M. Davis, a deputy mayor of Los Angeles, said that if not for undocumented workers "the garment, restaurant and auto repair business would fall over." Similar views have been expressed by Texas Governor William P. Clements, Jr.

Even the Select Commission on Immigration noted that foreign workers may actually create jobs by "taking undesirable jobs in industries that might otherwise relocate outside the country and by developing new business at home."

Indeed, the role of Mexican undocumented workers may be greater than realized.

U.S. HAS PREVIOUSLY ADDRESSED ILLEGAL IMMIGRATION THROUGH GUESTWORKER PROGRAMS

Our nation's history shows that foreign, undocumented workers have always played a role. For instance, Mexico has sent undocumented workers to the United States ever since the Mexican-American War of 1848. When the Chinese Exclusion Law of 1888 was enacted to prevent Oriental workers on American railroads, their place was taken by Mexican nationals.

The most rational approach ever taken towards stemming the undocumented worker tide from Mexico came in response to the U.S. manpower shortage arising from World War II. The United States and Mexico negotiated a treaty permitting the entry of Mexican farm workers, known as "braceros," to work, under contract, for U.S. employers.

For a number of years prior to this treaty, Mexican nationals worked in this country under an informal guestworker program. (Some have suggested that the number of these informal guestworkers or undocumented workers was as great in 1930 as it is today.) [11]

Despite technical deficiences, which made it difficult to administer, and strong opposition by organized labor, this program was substantially successful in stemming the wave of undocumented workers. For 22 years (1942-1964) Mexican nationals working in this country were either "documented" or "braceros", or undocumented or illegal. The vast majority, close to 90% were "documented," here legally, and returned to Mexico. The U.S. had "control" of its borders.

It was not until the ending of this guestworker program that the recent tide of "undocumented workers" from Mexico began to grow.[12] (See Table VII in Appendix and Chart IV).

Indeed, only recently the state of Idaho passed a legislative resolution requesting a guestworker program to "meet the labor needs" of the state.

The situation in Europe also provides an excellent example. European countries have had extensive foreign guestworker programs. One study estimated that it would have cost West Germany over $33 billion (in 1972) to replace its guestworker population. The French government concluded that if 150,000 of the migrant workers were forced to leave the country, jobs would be opened for a mere 13,000 French natives - with an additional unknown number of jobs lost.

Perhaps the most compelling evidence is the International Labor Organization study on the effects of foreign workers in Switzerland. Approximately one third of the Swiss labor force is made up of foreign workers, yet if just 10% of the foreign workers were forced to leave, Swiss workers would lose about 100,000 jobs.

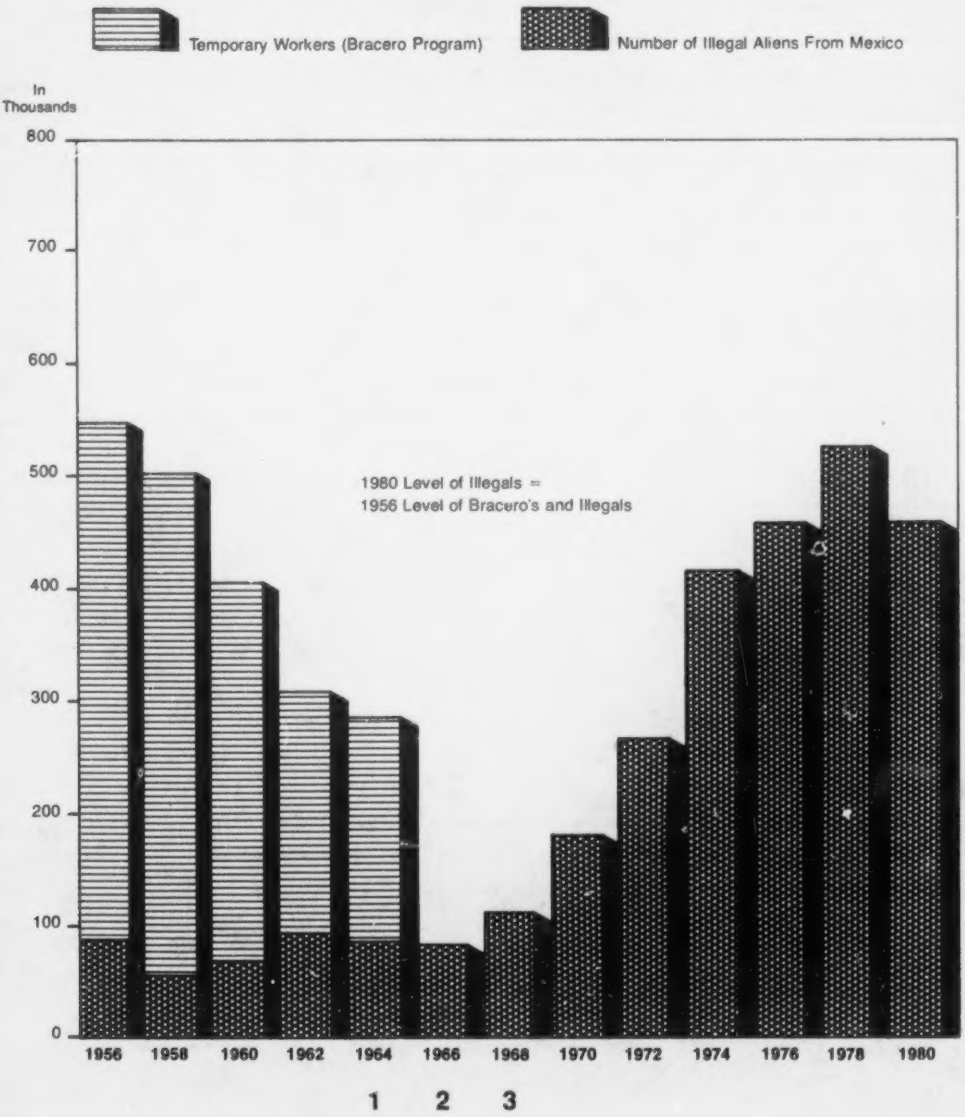
Experts admit that any system designed to stop undocumented workers will not be fool-proof. If, however, a substantial part of the problem can be solved by adopting a program which is consistent with historical patterns, which does not undermine our economy, and which does not unreasonably burden our citizenry, then it should be carefully explored.

11/ International Migration: The Search For Work by Kathleen Newland Worldwatch Paper #33, November 1979.

12/ Approximately 70% of deported illegal aliens are Mexican nationals (Study by S.K. Lesko Associates for I.N.S. 1977); and, of those Mexican illegal aliens 30% are counted twice (Statistical Yearbook of the I.N.S.).

Graph IV

IMMIGRATION LAWS — THE BRACERO PROGRAM — AND ILLEGAL ALIENS



[1] 1964-End of Bracero Program

[2] 1965-Stricter Standards Established for Temporary Workers

[3] 1968-New Immigration Laws Restrict Immigration From Western Hemisphere

Source: 1978 Statistical Yearbook of the Immigration and Naturalization Service and Work Measurement Report, 1977, Immigration and Naturalization Service Statistics Office.

Regardless of one's position concerning immigration, the long range implications on our nation's economy must be considered, and we urge the Subcommittee to examine carefully these effects before proceeding with legislation.

The U.S. Chamber does not specifically endorse a guestworker program. We are studying this proposed solution. We do recommend, however, that the Committee investigate such a proposal as an alternative to stem the tide of undocumented workers.

COOPERATION FROM OTHER COUNTRIES IS NEEDED TO SUCCESSFULLY CONTROL OUR IMMIGRATION LAW

A guestworker program contemplates international cooperation with the affected countries. The business community has already adopted a similar program through a novel approach to international cooperation. Over 600 companies have attempted to utilize the large labor force in Mexico by building "twin plants" along the U.S. - Mexico border. Manufacturing sites on the American side fully compliment Mexican assembly line operations.

More than 120,000 Mexicans are estimated to be working (in Mexico) in these plants. A marketing manager for the Bermudez Industrial Park in Juarez, Mexico says that surveys indicate that for every job created in Mexico, three jobs are maintained or created in the U.S.

However, we are only starting to understand this unique development. The more labor-intensive jobs are in Mexico while the higher skilled, more complex jobs are in the U.S. The problem seems to be that, once the Mexican national gets a few skills, he leaves -- presumably, to the United States.

But the actual positive effect to our nation may be substantial. Peter Drucker notes in his book "Managing in Turbulent Times" that:

> The mass migration from Mexico should ... endow American manufacturing with competitive strength such as it has not known for quite some time. The Southwest may be the only region in the developed world to show a sizable growth in traditional manufacturing industry over the next 20 or 25 years.

Congressional action should take into account this phenomenon.

SEVERAL OTHER OPTIONS AVAILABLE TO THE COMMITTEE

In addition to exploring the advisability of a guestworker program, we recommend that the Committee consider several other alternatives in place of employer sanctions:

- Revise the immigration statutes so that applicants from the Western Hemisphere are placed on equal footing with applicants from the Eastern Hemisphere. The current wave of illegal aliens developed after the 1965 Immigration Act restricted the immigration of Western Hemisphere citizens. Although the push factor from the Western Hemisphere is significantly stronger than that from the Eastern Hemisphere, Eastern Hemisphere applicants currently enter this country with no delays while there is a 2½ year backlog for applicants from the Western Hemisphere.

- Eliminate waste and inefficiency in the Immigration and Naturalization Service. For instance, every year the Immigration and Naturalization Service spends $13 million having legal permanent residents register their address. Apparently this information serves no useful purpose. Such money might be better spent enforcing programs.

- Increase the capacity of the border guards to enforce our immigration laws. There are more police officers assigned to guard the Capitol and the adjacent buildings in Congress (1,167) than there are INS officers patrolling our borders (450) during any 8 hour period. Even proponents of an employer sanctions law admit that increasing the resources for our border patrol could "stop or deter 90 to 95% of all attempts at illegal border crossing." (Source: Fact Sheet to S.776, March 23, 1981).

  Increased border enforcement does not mean that a "wall" would be built around our country. The U.S. shares with its neighbors in Canada and Mexico thousands of miles of unguarded borders. Border patrol officials claim that it is not the size of the border which encourages illegals but rather the lack of staffing. Most illegal

> border crossings occur within a 60 mile gap bordering parts of Texas and parts of California. Border guards know when and where illegal border crossings occur, but lack the proper resources to enforce the law. It seems that this alternative should also be investigated.

CONCLUSION

In its July 30, 1981 release on "U.S. Immigration and Refugee Policy," the Department of Justice stated, "The time for a clear U.S. immigration and refugee policy is long overdue."

The U.S. Chamber agrees. For social, economic and political reasons, we do need to reform our immigration policy and practices. The Administration has advanced a number of sound solutions in its wide-ranging and comprehensive proposals.

Yet, for the reasons given, we have serious reservations that an employer sanctions law should be part of the reforms adopted, although we will continue to review this proposal. Furthermore, we plan to explore further all other aspects of this complex problem to seek comprehensive solutions.

We hope to share the benefits of our efforts with the Congress and the Administration.

TABLE I

A COMPARISON OF THE UNEMPLOYMENT RATES OF CITIES WITH HIGH VERSUS LOW CONCENTRATION OF ILLEGAL ALIENS

High Concentration		Little or No Concentration	
Albuquerque, NM	7.9	Baton Rouge, LA	11.3
Amarillo, TX	6.0	Buffalo, NY	9.5
Anaheim-Santa Ana, CA	4.5	Decatur, IL	10.8
Beaumont Area, TX	10.2	Dubuque, IA	9.5
Chicago, IL	8.0	Detroit, MI	11.4
Corpus Christi, TX	8.5	Eugene, OR	10.5
Dallas, Fort Worth, TX	6.6	Flint, MI	13.9
Denver, CO	5.6	Gary, IN	10.5
El Paso, TX	11.7	Huntington, WV	10.8
Ft. Lauderdale, FL	5.0	Johnston, PA	13.9
Houston, TX	6.2	Kankakee, IL	11.2
Los Angeles, CA	6.6	Muncie, IA	11.9
Miami, FL	6.0	Muskegon Heights, MI	13.2
New York, NY	7.6	Pine Bluff, AR	10.3
Orlando, FL	6.7	Rockford, IL	9.7
San Antonio, TX	9.2	Salem, OR	8.5
San Diego, CA	6.5	Toledo, OH	9.3
San Francisco, CA	5.5	Tuscaloosa, AL	9.9
Tucson, AZ	5.4	Williamsport, PA	13.4
Washington, DC	9.8	Youngstown, OH	9.4
Average:	7.17%	Average:	10.9%

National Average: 7.7

Source U.S. Bureau of Labor Statistics

TABLE II

A COMPARISON OF THE UNEMPLOYMENT RATES OF STATES WITH HIGH VERSUS NO CONCENTRATION OF ILLEGAL ALIENS - 1981

States with High Concentration		States with No Concentration	
Arizona	6.4	Alabama	9.8
California	6.7	Alaska	9.0
Colorado	6.0	Arkansas	8.4
Florida	6.3	Indiana	9.1
Nevada	6.7	Michigan	11.1
New Jersey	7.4	Mississippi	8.6
New Mexico	8.1	Oregon	9.4
New York	7.6	Tennessee	8.6
Texas	7.2	Washington	9.3
Utah	6.3	West Virginia	10.8
Average:	6.87	Average:	9.41

National Average: 7.7

Source U.S. Bureau of Labor Statistics

TABLE III

AVERAGE ANNUAL UNEMPLOYMENT RATES FOR BLACKS IN MAJOR METROPOLITAN AREAS: 1980 ANNUAL AVERAGE

Cities with a High Concentration of Undocumented Workers	
Anaheim, CA	6.1
Chicago, IL	15.6
Dallas, TX	10.7
Denver, CO	13.7
Houston, TX	10.2
Los Angeles, CA	10.7
Miami, FL	6.6
New York, NY	10.9
San Bernardino, CA	13.5
San Diego, CA	9.8
San Francisco, CA	12.0
Washington, DC	8.4
Average:	10.7

Cities with a Low Concentration of Undocumented Workers	
Atlanta, GA	10.8
Baltimore, MD	12.9
Boston, MA	4.3
Buffalo, NY	23.5
Cincinnati, OH	20.3
Cleveland, OH	19.1
Detroit, MI	25.3
Indianapolis, IN	16.5
Kansas City, MO	15.5
Milwaukee, WI	18.0
Nassau, Suffolk, NY	9.5
Newark, NJ	14.4
Philadelphia, PA	17.8
Pittsburgh, PA	14.3
St. Louis, MO	15.5
San Jose, CA	7.5
Seattle, WA	8.5
Average:	14.9

National Average 13.2

Source USDL Press Release Number 81-183, April 16, 1981

TABLE IV

AVERAGE ANNUAL UNEMPLOYMENT RATE FOR HISPANIC WORKERS IN SELECTED METROPOLITAN AREAS

Cities with a High Concentration of Undocumented Workers

Chicago, IL	14.9
Houston, TX	7.3
Los Angeles, CA	8.7
Miami, FL	7.6
New York, NY	11.2
San Francisco, CA	8.3
Average	9.6
National Average	10.1

Source: U.S.D.L. Press Release Number 81-183, April 16, 1981.

TABLE V

ANNUAL RATES OF EMPLOYMENT GROWTH BY STATES (for past 20 years)

STATE	RATE	RANK
Nevada	6.5	1
Arizona	6.0	2
Florida	5.3	3
New Mexico	4.1	4
Colorado	4.0	5
California	3.6	6
Utah	3.6	7
Texas	3.5	8
New Jersey	2.0	36
New York	0.8	46
Average	3.9	
Without New York	4.3	
National Average	2.2	

Source U.S. Bureau of Labor Statistics
Press Release 80-164, April 7, 1980.

TABLE VI

Average Annual Pay by State and Undocumented Workers

States with a High Concentration of Undocumented Workers		States with a Low Concentration of Undocumented Workers	
Arizona	$12,498	Alabama	$11,854
California	13,959	Alaska	20,973
Colorado	13,022	Arkansas	10,685
Florida	11,516	Indiana	13,332
Nevada	12,876	Michigan	15,733
New Jersey	13,941	Mississippi	10,410
New Mexico	12,018	Oregon	13,203
New York	14,320	Tennessee	11,573
Texas	13,080	Washington	14,340
Utah	12,239	West Virginia	13,350
Average	12,946	Average	13,545
		Without Alaska	12,720

National Average $13,137

Range of Average Pay	The Number of States with a High Concentration of Undocumented Workers	The Number of States with a Low Concentration of Undocumented Workers
$15,460 and over	0	2
13,840 - $15,459	3	1
12,210 - 13,839	5	3
10,590 - 12,209	2	3
Below $10,590	0	1

Source: U.S. Department of Labor - Bureau of Labor Statistics

TABLE VII

	Aliens Deported	Approximately * 75% of Aliens Are From Mexico	Approximately 70% * * of Located Mexicans Are the Same Person	Guestworkers (Braceros)
1956	88,000			460,000
1958	54,000			450,000
1960	70,000			334,000
1962	92,000			217,000
1964	86,000	Change in Immigration Laws		200,000
1966	138,000	103,000	72,000	
1968	212,000	159,000	111,000	
1970	345,000	258,000	180,000	
1972	505,000	378,000	264,000	
1974	788,000	591,000	413,000	
1976	876,000	657,000	459,000	
1978	1,070,000	750,000	525,000	
1980	871,000	654,000	457,000	

Sources· Statistical Yearbook of the Immigration and Naturalization Service

* Study by Lesko Associates, 1975. Final Report for Office of Planning and Evaluation, U.S. Immigration and Naturalization Service.

** Work Measurement Report, Statistical Yearbook of the Immigration and Naturalization Service, FY 1978.

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Chamber of Commerce of the United States

1615 H Street, N.W.
Washington, D.C. 20062

NEWS RELEASE

FOR IMMEDIATE RELEASE
Wednesday, September 30, 1981

Contact: Ted Princiotto
(202) 659-6233

U. S. CHAMBER DEPLORES HIRING OF ILLEGAL ALIENS BUT DOUBTS EMPLOYER SANCTIONS WOULD BE A REMEDY

WASHINGTON, Sept. 30 -- While deploring the hiring of aliens who are unlawfully in the country, the U.S. Chamber of Commerce today seriously questioned proposals which, in practice, would require millions of Americans to prove their citizenship in order to seek employment.

The proposals under criticism would require employers to determine whether new employees are in the country legally and subject employers to fines if found guilty of hiring illegal aliens.

According to the Chamber, employer sanctions would prove futile against the historical forces causing immigration to this country, such as guaranteed personal freedoms and economic opportunity.

"The proposal is premised on shifting to private citizens the responsibility to uncover illegal aliens," declared the Chamber in Senate testimony of Robert T. Thompson, chairman of its Labor Relations Committee.

"The proposal would require 106 million American workers to prove their citizenship and could place an unworkable burden on employers to determine the citizenship status of those workers."

For personal reasons, Thompson was unable to appear as scheduled before the Immigration Subcommittee of the Senate Judiciary Committee, which is studying a proposal by Sen. Walter D. Huddleston (D-Ky.) and a plan announced in June by the Reagan Administration. A copy of the Thompson statement was submitted by Christopher Luis, a labor law attorney for the Chamber.

Both proposals call for fines against employers. Under the administration plan, a worker could prove legal status by submitting documents from the U.S. Immigration and Naturalization Service (INS), or any two of the following documents: birth certificate, driver's license, Social Security card or draft card. Employers would be required to submit a certified statement of compliance with the law for each new employee.

The Huddleston plan would require use of a National Identification/Work Permit card by both U.S. citizens and aliens legally residing in the country. It would require a centralized computer data bank system operated by the federal government. Employers would have to check with the federal government before being able to hire a prospective employee.

The Thompson statement was a 22-page summary of the issues raised by employer sanctions. He is a member of the Chamber Board of Directors, serving as a regional vice chairman. He also is a senior partner in the law firm of Thompson, Mann and Hutson of Washington, D.C. and Greenville, S.C.

In its statement, the Chamber made these points:

-- The federal government has little or no control over the use of illicit documents. Social security cards are obtained through fraud, administrative errors and lax questioning by the federal government itself. Similar problems would confront use of birth certificates, driver's licenses and draft cards.

-- The vast majority of employers do not intentionally recruit or hire illegal aliens. Federal statutes discourage such practice, penalizing violators with both prison and fines.

-- Several government studies have shown that it is not true that employers exploit illegal aliens by paying them lower wages.

-- A study of data from the U.S. Bureau of Labor Statistics and INS shows no correlation between illegal aliens who work and unemployment rates. This finding discounts the claim that such workers are taking jobs from Americans, thereby fostering higher unemployment.

According to Thompson, the Huddleston proposal sharply underestimates the work load involved in using a central computer system. In contrast to an estimated 15 million new hires each year, as sponsors claim, Thompson cited the 50 percent labor turnover in the manufacturing industry -- "perhaps, our most stable" -- and other government labor data indicating that a labor turnover rate of 70 million new hires yearly may be a minimum. As a minimum, the cost for starting such a program would be $3.5 billion. The impact this proposal will have on the federal budget may merit its rejection.

As an example of INS failure to develop a "fool-proof" identification system, Thompson cited the current registration system or census of aliens living in the United States.

In three years' time, Thompson reported, the "green" card identification system has already run up costs five times greater than estimated for a seven-year program and has created new confusion.

"The alien registration card is not green but comes in a blue or a pink color," he said.

"This is what happened when the government attempted to issue counterfeit-proof cards to 4.5 million permanent residents. Imagine a similar scenario for the 106 million legal working American citizens, or perhaps all 230 million Americans. It would be chaotic."

The Chamber suggested several alternatives for the committee to consider in place of an employer sanctions law. These include:

-- Increasing the number of border guards necessary to enforce our immigration laws. Currently, there are more police officers assigned to guard the Congress than there are border guards patrolling our borders.

-- Eliminate waste and inefficiency in the INS.

-- Adopt a Mexican guestworker program under which Mexican nationals would be legally allowed to work in this country for certain periods of time. Government data show that the recent influx of illegal aliens started only after a similar guestworker program was ended in the 1960's.

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NOTE TO EDITORS: A complete copy of the statement may be obtained from the U.S. Chamber News Department, (202) 659-6233.

Senator SIMPSON. The other member of that panel is with us today. He is Mr. Perry Ellsworth, executive vice president of the National Council of Agricultural Employers. We appreciate having your testimony, Mr. Ellsworth, and if you will proceed. In this instance please take 10 minutes, since we do not have the other gentleman to testify, if you can take that much.

STATEMENT OF PERRY ELLSWORTH, EXECUTIVE VICE PRESIDENT, NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

Mr. ELLSWORTH. I can get within 10 minutes.

I appreciate very much the opportunity to appear before your subcommittee today, Mr. Chairman, and to discuss this particular topic. Probably the difficulty in discussing any one particular aspect of the proposed program or any program is that there is more than one facet and when you talk about one you frequently have to, I will use the word, "slough over" into others. So if I do so, it will be with the idea in mind of trying to make the points that I am making on today's topic, rather than stealing thunder from future hearings.

I am not going to speak at all on behalf of the nonagricultural business community. I am sorry that Mr. Thompson is not here to give the views on that, but you will have to get that from his statement.

As I said before, Senator, when I appeared before the joint meeting of the two Immigration Subcommittees, House and Senate, last May, my association is neither for nor against the imposition of employer sanctions at this time. But we have taken the position that definitely says that if employer sanctions are imposed, then such legislation must contain four provisions, one of which is there has to be the word "knowingly" in there, so that an employer has that defense of saying that he did not knowingly hire an illegal alien.

Second, there must be a mechanism for some sort of appeal, depending on especially the size of the fine that would be levied.

Third, there has to be a means of identifying employment eligibility, and we certainly talked about that this morning.

And fourth, we feel we have to have some means to offset a worker shortfall if there are not enough U.S. workers to fill the needs of agricultural employers.

Now, as you probably have heard before and will undoubtedly hear again, the agricultural employee-employer picture differs materially from that of the nonagricultural. A very small number of workers, only 758,000 out of a total hired farm working force of 2,652,000 worked 150 or more days out of the year, and only 423,000 worked more than 249 days.

This means that agricultural employers for all practical purposes, with the exception perhaps of some in California, end up hiring an entire work force at least once a year, and down in the Florida area with some crops it is twice a year that they start from zero and build up to a full work force.

Now, we do not have statistics that can prove this point, but I think our views are as good as anybody's at this point. We are all talking about something that has not happened. Agricultural employers are fearful that, if not immediately, at least over a period of 1 to 3 years, the present illegal alien work force in this country, if granted amnesty and if they accept that amnesty, will disappear in large measure from the agricultural labor work force.

Now, there are perhaps two ways that will happen, one of which is they will move to other jobs where they may get 12 months out of the year employment, and in perhaps an air-conditioned facility instead of outside in the fields. Second, we have a feeling that there are going to be a number of those people working in this country at the moment illegally who may decide that they really do not want to be U.S. citizens, do not want amnesty. They were up here to earn money, and if it is going to get to the point where they choose between amnesty or not having amnesty they may just opt to hold with going back to Mexico.

Again, as I say, we do not know but we have that fear. The net result, however, we think is going to be a measurable shortfall in the number of legal workers available.

Now, turning back to employer sanctions, if the beliefs and the conclusions of my association are correct, then the proposed experimental temporary worker program involving a total of 50,000 workers per year would fall far, far short of meeting agriculture's needs, even if all those 50,000 workers were limited to agricultural employment.

At the risk of being highly repetitive—but as you said, Senator, sometimes there is no such thing as repetition—NCAE sees nothing but trouble if employer sanctions are imposed and there is no highly responsive temporary foreign worker program above and beyond the present guest worker program in its present numbers of 50,000.

Now, I think in my summary as I went through I mentioned the need for a speedy system of identifying a legal worker. What that system may be is open to conjecture. This morning we heard a lot of conversation favoring the use of the social security card. This noon I had loaded on me the whole wagonload of data about what can be done with a data bank and with telephone calls to an 800 number.

I know that my association has not arrived at a definitive point, except to say that looking at what is there now, as I will elaborate on next Friday, we think probably the approach toward a social security card that is as nearly counterfeit-proof as possible may be the first step. It may not be the ultimate step, but certainly the first one.

Senator, that is a quick summary of what I have to say.

Senator SIMPSON. I thank you, and we will be looking forward to your participation throughout this hearing period of next few weeks.

Let me ask several questions. Do you feel that the illegal influx into the United States of persons from poorer countries can be controlled as long as U.S. employers may legally offer them employment? Do you have any alternative to employer sanctions which would serve to control illegal immigration?

Mr. ELLSWORTH. No, sir, I think at this point we do not.

Senator SIMPSON. Do you think it can be controlled if we do not use some type of employer sanctions?

Mr. ELLSWORTH. The statement was made this morning by one witness, and I forget which one, that employers bring in illegal aliens and use them because of various reasons. There probably is some bringing in of illegal aliens and I do not know for sure on this, but it is my considered judgment that most of the illegal aliens come to this country and then seek employment, rather than have jobs offered to them while they are still in Mexico and then come to this country.

So, as they come into this country at the present time, it is quite legal, as you know, for an employer to hire that person who has crossed into this country illegally, with one exception: the registered farm labor contractor under the Farm Labor Contractor Registration Act.

Now, if a law is passed in this country saying that thou shalt not hire illegal aliens, and if there is a fine put upon it—and I do not know what that fine might be—I think you would find that the great bulk of American employers would attempt to do their best to not hire illegal aliens.

We tried an experiment like this in Colorado 2 years ago. We had some growers out there that were using illegal aliens to harvest apples. We said to them: "One, that is morally wrong. Two, you are asking for trouble because the Border Patrol can move in and round up those workers, or really, all the Border Patrol has to do is drive through the area and the workers will disappear.

We said, why do you not go a legal route presently open to you, and apply for temporary foreign workers, and then you will have to prove that there are not any U.S. workers willing to pick these apples. If you get that worked out you are at least legal in doing these things.

They decided they would try that route. Well, the problems they had with the Labor Department would take too long to explain.

But the point I am making is that I think employers would rather have legal workers, of whatever kind, rather than illegals where, especially in agriculture, they have the problem of having the Border Patrol car drive through the area and 50 or 60 percent of their crew disappears into the woods. If that car stays around for three days, that is three days of crops that are not picked.

Senator **Simpson**. I assume you are referring to the H-2 program. I think that originally it was expected that maybe 300,000 of those personnel might come to the United States, yet the H-2 program last year brought less than 40,000 employees to the United States.

I am sure that there will be many reasons presented to us as to why that is the case. It is something we are going to pursue in the hearing process.

If a secure verification system were available in order that an employer trying earnestly to comply with the law felt that he or she were protected, could you then find yourself in support of an employer sanction program?

Mr. **Ellsworth**. Yes, sir, we could.

Senator **Simpson**. You could, with a verifier or identifier system?

Mr. **Ellsworth**. Yes, sir, a system—and I do not know which one it is yet, but yes, sir.

Senator **Simpson**. I do not ask you which kind.

Mr. **Ellsworth**. I intended to say at the beginning of my oral statement, that I would like to have the record show that we are addressing concepts here and not any specific legislation, and depending upon what legislation this may take, we may be changing our tactics someplace. But yes, sir.

Senator **Simpson**. Yes; that is assuredly part of the record.

Do you agree that an adequate supply of U.S. workers would be available for nearly every job in the country in your industry if the pay were high enough, and that the only issue really is whether an employer can afford to pay the necessary wage?

Mr. **Ellsworth**. I suspect, although I am not a student of economics, that there is always a salary at which a worker will take any job. I know there are several that I would have to get paid an awful lot for, one of which is deep coal mining, but I suppose there is a point at which I would take employment there.

So yes, there may well be a point at which we could say we could hire all U.S. workers. Now, the question comes, we might have the workers at that salary, but we might not have the jobs at that salary more than 1 year, as employers could not afford to reach that point.

Senator **Simpson**. I think that is what we have to keep in mind, that many industries over the years have been unable to remain competitive within the United States due to higher wages here, and as a result most of their U.S. personnel and capital have been transferred to other industries.

Presumably they might well have been able to survive if they had been allowed to import cheap foreign labor. That might be. But I think then, would not the result of that have been to maintain a lower degree of mechanization and technology in business, and therefore I think a lower per capita GNP for the country? Would that not possibly have been a result?

Mr. **Ellsworth**. I would think so. I was just going to say, sir, that this country points with pride at the ability of its farmers to feed all the people in this country plus hundreds of thousands in other countries around the world, and you cannot do that with a horse and a single walking plow.

Senator **Simpson**. I do not like to worship at the altar of the GNP, but it is certainly a factor that we use in the deliberations which go on in this place. But there is truth in what you say about technology and what we are being asked to do to provide the world goods, increase exports in every field.

Well, always there comes a nub question with the various groups that we deal with on this highly volatile issue of immigration and refugee policy reform. You heard some this morning with regard to the American labor movement, the American Hispanic groups. And we heard positions pro and con. Critics of the positions of employers who oppose sanctions claim that that position is not really based on what would be for the "national interest" quote, unquote, but rather on a desire of a minority of employers to maintain the possible use of cheaper foreign labor.

How do you respond to that when that is expressed to you, like it just was?

Mr. **Ellsworth**. Well, I do not know how I can respond to a statement which as far as I know is not based on fact, nor do I have the facts to do otherwise. I was just thinking that if the administration's figures are correct there are 3 to 6 million illegal aliens in this country, of which 15 percent are in agriculture.

Now let us take 3 million as the lowest figure, and take that figure or take 6, I do not care. Let us take 6; 6 million would bring 900,000 illegal aliens into agriculture, which I find terribly difficult to believe. But even so, the work force is almost a million more than that.

Now, if illegal aliens are easy to find and beat down and take advantage of and cheat, then why do not more farmers have more illegal aliens? Why do we not have an illegal alien work force that equals the total hired work force of this country?

I am not trying to be mean about it, but I do not think there are any statistics that prove it either way. Now, we know—and bringing up the Farmer Labor Contractor Registration Act—we know and we have supported legislation that would attempt to hold down any abuses or eliminate the abuses of crew leaders against their workers. One of the things that came about with that act was a prohibition against hiring an illegal alien by a registered farm labor contractor. To the extent that that is enforced we have eliminated the potential for abuse to illegals in those crews. Now, of course we have not eliminated the opportunity for employment there too. But the question was a matter of abuse and so on.

I find it difficult to answer factually a question which I find it very difficult to believe is factually true.

Senator **Simpson**. And I understand that thoroughly. But you know, we deal with so many myths in this area. It is apparently a myth, or at least a misconception, that American workers will not take those jobs and therefore there is no one being displaced; the labor movement insists that that is just not so.

And as I say, there are those who are critics of the position of many employers, who say that there are a minority of employers who are very anxious to exploit and make a profit in this area. And you indicate to us or to the subcommittee that that is not so, that you have no facts to support that. There are no facts to support that?

Mr. **Ellsworth**. Well, I would say, sir, I do not see any facts on the other side to support it, No. 1; and second, the word "minority" has to be defined first. If we are talking about one or two employers, just to be ridiculous, I would say, absolutely there are probably those employers who are doing this.

But of all employers in this country, I have been knocking around in agriculture since I got out of college and finished 4 years in the Army, I have not seen evidence of this, I have had employers show me payrolls and everything. Now, maybe only the good ones do, I do not know.

Senator **Simpson**. I might just add that that 15-percent figure we were using this morning had to do with—it was applicable only with Mexican illegal aliens. It is estimated that only 2 to 3 percent of non-Mexican illegal aliens work in agriculture.

Mr. **Ellsworth**. That is more understandable.

Senator **Simpson**. Senator Thurmond, chairman of the Judiciary Committee, is having a meeting at this moment and requires a quorum, and I must go to meet that quorum because it is a budget matter.

Mr. Day, Mr. Dick Day, will ask a few questions. I hate to do that. I do not like to do that. It is repugnant to me to have any witness testifying to a staff member, no matter how capable. I must do that at this point, however. Mr. Day is the chief counsel and the staff director of the subcommittee. I will be back as soon as that quorum is established.

Mr. **Day**. I know you have a plane to catch, Mr. Ellsworth. I will just ask a couple of questions to fill out the record here, so that we do not have to send them to you.

In your testimony you state that agricultural employers would find a procedure requiring extra paperwork to be undesirable. Would you please state for the record what kind of paperwork is now involved for most agricultural employers when new workers are hired?

Mr. **Ellsworth**. We go down to the basic paperwork that is required if somehow an employer is going to have to get a name and a social security number for each agricultural employee that is hired. And that obviously is for payroll purposes. Most of them will pick up an address, as far as I know always, and that is the paperwork part of it.

Then there is the payroll. During the day the hours worked, if it is an hourly pay deal, are recorded. If it is a piece rate, the earnings and the hours worked are recorded. This information is taken, either the next day to the office, if there be an office, or that evening the farmer and his wife work on the payroll records from the field copy.

The point that I was trying to make on this is that at the time the farmer hires workers—I remember we did this the exact same way. We did not want workers there 1 day before they could go to work, and in fact the workers did not want to come in and not have work to do. We wanted them in and working, and the minute harvest started we wanted to turn our full attention to getting that crop harvested.

So we wanted minimal paperwork involved. Now, when you go to an operation where you have a business office on that farm, this tends to permit more, quote, "paperwork" unquote, than would an individual farmer, his wife, and perhaps a foreman or a general superintendent. This just throws more of a paperwork burden on them.

That is all I meant in that context. As you think in terms of what you are going to require an employer to do, keep in mind that the employer on Ellsworth's farm is a little different than the personnel office of Republic Steel. You have to look at both of them, and I selfishly want to see that I do not get burdened with a lot of papers. That is the point I was making.

There has to be some addition, but there may not.

Mr. DAY. At the present time every person who willfully or knowingly harbors any alien not duly admitted or lawfully entitled to reside in the United States is guilty of a felony, subject to the famous Texas proviso, which provides that "employment shall not be deemed to constitute harboring."

The law also provides that any person is guilty of a felony who willfully or knowingly encourages or induces, either directly or indirectly, the entry into the United States of any alien not duly admitted or lawfully entitled to enter or reside within the United States. It would seem that this basically amounts to the crime of aiding and abetting another person to violate the law.

Why should employers be able to do that, when other persons cannot?

Mr. ELLSWORTH. Do what?

Mr. DAY. Well, if I was an employer and I allowed an illegal alien to sleep in my bunkhouse as part of the employment, I would not be guilty of the felony of harboring an illegal alien. Yet if anyone besides an employer provided these accommodations, he would indeed be guilty.

Does not the Texas proviso in effect allow an employer to aid and abet an illegal alien in breaking the immigration law? And if so, why should the employers have that special permission to do that when others cannot?

Mr. ELLSWORTH. I do not know the background and history of that provision in the act, but I do know that there are presently on the books regulations requiring a farm employer to provide housing for migrant workers. And I do not know, but I would suspect that someplace back there someone said, now wait a minute, we have migrant farmworkers that need housing and we cannot very well hang a farmer if he does not provide that housing, or if he does provide that housing and has in his crew some illegal aliens. But there is no law against him hiring the illegal alien.

So I think that is how it developed, sir, but I am not dead sure. I know it is only as a condition of employment, so that that's right, if I were to house, as a special accommodation to you to make it easier for you to have an illegal alien working for you, then I would be guilty of harboring.

But that is not, I think, the concept under which this was written.

Mr. DAY. OK, I believe that is all the questions that Senator Simpson had prepared for you, Mr. Ellsworth. Since you do have to make an airplane, we will thank you for your testimony and not keep you any longer. Now we will recess for approximately 10 minutes. I think Senator Simpson should be back from the Judiciary Committee executive meeting by that time, and we will then go ahead with the next panel, all of whom have come early because the other business panelist was unable to attend. We appreciate that.

[The prepared statement of Mr. Ellsworth follows:]

THE PREPARED STATEMENT OF PERRY R. ELLSWORTH

The National Council of Agricultural Employers is a national, voluntary membership association of individuals, companies and associations that employ agricultural labor. I am Perry R. Ellsworth, Executive Vice President of the Council.

The purpose of this hearing is to discuss employer sanctions, the imposing on employers of a prohibition against hiring employees who are not legally entitled to employment in this country. NCAE appreciates the desire of this Subcommittee to limit remarks to the specific subject at hand, but in a matter as complex as the President's proposal where one aspect either depends upon or influences another, it is difficult to isolate a single aspect. Be that as it may, the thrust of this statement shall be to the subject at hand.

Speaking to a general proposal, the details of which have not been spelled out in proposed legislation, is also difficult. NCAE asks that its views as expressed here today be noted as based on a non-detailed proposal only.

NCAE is neither for nor against employer sanctions at this time. On May 5, 1981 when NCAE appeared before the joint hearing of this Subcommittee and the House Subcommittee on Immigration, Refugees and International Law regarding the final report of the Select Commission on Immigration and Refugee Policy we said that NCAE has a definite position regarding what must be done if legislation is enacted to impose employer sanctions. The four actions listed then, and still valid today, were:

1. Such legislation must contain a prohibition against knowingly hiring undocumented workers. Absence of "knowingly" would

expose employers to unjustified citation. There is no way that an employer can be absolutely certain that a document presented to establish citizenship or to prove legal authorization for employment is bona fide. As is the case with every law enacted, the overwhelming majority of citizens will abide by the law, but there are occasional honest errors. While it may be difficult to prove "knowing" action, simple justice would seem to dictate the use of the word in this instance.

2. Such legislation must provide a mechanism for appeal.
3. Such legislation must provide a reliable means of verifying employment eligibility. This is especially true in agriculture where, unlike a non-agricultural business which hires a limited number of persons on any given day, large numbers of workers are frequently hired at the start of harvest. A procedure requiring extra paperwork is not desireable, for agricultural employers have every minute of their working hours filled with harvest details. This is especially true where a large labor force turnover exists or where "day haul" workers are employed. Another requirement, peculiar to agriculture, is that employers must be able to verify employment eligibility in the field. In many parts of the country, workers are hired in the field, work in the field and are paid in the field. Their foreman is the "personnel director." Such workers may never lay eyes on the company's office, much less be processed by it.
4. Such legislation must be accompanied by a program which will enable agricultural employers to speedily obtain workers to make up for a U.S. worker "shortfall." More on this later.

As you have probably heard before and will undoubtedly hear again, the agricultural employee-employer picture differs materially from that of the non-agricultural picture. A very small number of workers (758,000 out of a total hired farm work force of 2,652,000) work 150 or more days

out of a year, and only 423,000 work more than 249 days. 1/ This means that agricultural employers, unlike other employers, end up, for all practical purposes, hiring an entire work force each year.
Slipping over from the primary focus of this hearing, there appears to be an assumption on the part of many that the present illegal aliens employed in agriculture will all seek and accept amnesty, and that if they do, they will remain in agriculture. There is reason to doubt both assumptions.

First, much has been written about the nomadic nature of farm workers, especially those from Mexico and South American countries. Like all other aspects of the problem, there are precious few statistics, but several researchers have determined that large numbers of farm workers who have entered this country by crossing its southern border, have no intention of remaining nor desire to remain here indefinitely. Their families are back in the country whence they came. They are unlike, for instance, a Filipino doctor here illegally who wants to remain at all costs.

Agricultural employers are fearful that if not immediately, over a period of one to three years the present illegal agricultural work force will diminish measureably. Those illegals who accept amnesty will, to a degree unknown, seek year-'round jobs in other businesses. The rate of pay may not differ, but the regularity of year-'round work will prove enticing. Others, not wishing to remain here and qualify for citizenship will return to their homes and be unable to return. The net result, agricultural employers believe, will be a measureable shortfall in the number of legal workers available.

There are those who will immediately aver that if agricultural employers

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1/ "The Hired Farm Working Force of 1979," Agricultural Economic Report Number 473, U.S. Department of Labor, August, 1981 would increase their wages, they would have no difficulty finding all the U.S. workers needed. NCAE takes exception to that proposition, but this is not the forum in which to discuss the subject.

If employer sanctions are imposed—and at this point, remember, NCAE has no position pro or con on the proposal—agricultural employers may very well find themselves face-to-face with a genuine problem. The problem is greatly exacerbated for agricultural employers. Unlike a restaurant, factory or other non-agricultural business operating 12 months per year, Agricultural employers must develop a work force from zero to the full number needed in a very short period of time. Seeking out and hiring one or two workers to fill a need in a hotel is one thing. Seeking out and finding several thousand workers for a two-month harvest of apples in New England and, in fact, clear across the United States or up to 8,000 to harvest sugar cane in Florida and to have them report on the same day at any given farm, ranch or orchard is quite another.

All the above leads to the subject of your October 2 hearing—the need for a speedy, reliable method whereby an agricultural employer can identify legal workers.

Turning back to employer sanctions, if the beliefs and conclusions of NCAE are correct, the proposed experimental temporary worker program involving a total of 50,000 workers per year would fall far, far short of meeting agriculture's needs even if all such workers were limited to agricultural employment. Using the Attorney General's statistics contained in his report to this Subcommittee on July 30, 1981, there are between 3 and 6 million illegal aliens in this country. Using the lower figure and the Attorney General's estimate that 15% of that number are employed in agriculture, there are an estimated 450,000 currently employed in agriculture, a figure nine times the total number of guest workers proposed for legal entry for employment in all businesses in the United States!

At the risk of being highly repetitive, NCAE sees nothing but trouble if employer sanctions are imposed and no highly responsive temporary foreign worker program, above and beyond the so-called guest worker program, is in place and operable.

NCAE appreciates this opportunity to appear today to express its views on the matter of employer sanctions.

[Recess.]

Senator Simpson. Well, welcome to you all. How are you, Jack? We served together on the Select Commission and we together know what hell is. [Laughter.]

It is a pleasure to have you and welcome you. And Arnold I know, and John, yes, nice to see you again. I apologize for the delay. We did finally get a quorum and then left the discussion to the rest of the committee members. The legislation will be polled out later. I am sorry, but I had no choice on that one.

So we now have the testimony of the various ethnic organizations. I believe, Jack, you proceed first under the schedule. We appreciate your testimony.

STATEMENT OF JOAQUIN F. OTERO, INTERNATIONAL VICE PRESIDENT, BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, AND EXECUTIVE VICE CHAIRMAN, LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT, ACCOMPANIED BY ALFREDO MONTOYA, EXECUTIVE DIRECTOR [LCLAA]

Mr. Otero. Thank you, Mr. Chairman. My name is Joaquin Francisco Otero. I am international vice president of the Brotherwood of Railway and Airline Clerks, and I also function as executive vice chairman of the Labor Council for Latin American Advancement, which is a nationwide labor organization representing thousands of Hispanic workers throughout the country.

I am accompanied this morning by Mr. Alfredo Montoya from El Paso, Tex., who is the executive director of the Labor Council for Latin American Advancement.

As you know, Mr. Chairman, I had the honor and pleasure of serving with you from July of 1979 to April of 1981 as a public member of the Select Commission on Immigration and Refugee Policy. And along with you, Mr. Chairman, and a number of other distinguished Americans, I had the great honor to work in this Commission to develop a comprehensive and humane immigration policy for our country.

I sincerely hope that it will be the conclusions of the Commission's report, along with the proposals made by the Reagan administration, that this committee will be reviewing with the definite intent of adopting the Commission's recommendations into law.

As you well know, there are a number of factors responsible for the presence of over 5 million illegal immigrants in the United

States today. Certainly, political instability and lack of economic opportunity in their home countries cause thousands of people to seek new lands and opportunity.

Recent events in Southeast Asia, Korea, Cuba, and Haiti tend to underscore this "push" factor in immigration. It is, however, the very real possibility of finding work in the United States that points people in our direction. As the Commission noted in its final report, "All studies demonstrate that U.S. economic opportunity is the magnet that attracts those who enter the country illegally, regardless of the nationality or gender."

In the studies that the Commission reviewed, particularly those of Dr. David North and Dr. Marion Houstoun, who interviewed apprehended migrants, 74.2 percent of those who were interviewed said they came to the United States to find a job. Also, in the study conducted by Dr. Wayne Cornelius, who interviewed Mexican undocumented illegal workers from Jalisco, Mexico, 77 percent cited the need to increase their earnings through U.S. employment.

It is very clear, therefore, that illegal immigrants come to the United States in search of work. They understand that if they can get across the border or enter legally and overstay their visas, as is the case with almost 50 percent of illegals, then there is a reasonable chance that they will find a job, be it picking fruit, washing dishes, waiting on tables, working on the railroads, or in industrial plants.

I would like to underscore, Mr. Chairman, that contrary to popular belief, illegals in this country do not concentrate on agriculture. Today we have illegal aliens working in every State of the Union and in almost every facet of employment, from service industries to industrial production, the whole gamut.

These people are also likely to find low pay, long hours and dangerous working conditions. Any employer in this country is aware that whatever he offers illegal aliens, it is considerably more than they would have ever received in their home countries. Moreover, such employers take full advantage and exploit the docility and fear of apprehension of such illegals.

I strongly believe, as the Commission did, that legislation forbidding U.S. employers from hiring illegal immigrants should be passed as soon as possible. The present law, which makes it illegal for an alien to enter the United States without inspection or be here without proper documentation, but not for that alien to work after he has entered the country, is a hopelessly insufficient deterrent.

To solve this problem, we must make the hiring of illegal immigrants unprofitable for such employers. Therefore, I would like to propose specifically, Mr. Chairman, that Congress approve a strict set of sanctions against all employers who knowingly hire illegal immigrants. I also favor criminal penalties for employers who are repeat offenders.

Second, I favor tighter enforcement of existing labor laws, which is today one of the major weaknesses in our enforcement program, laws such as the Fair Labor Standards Act, the National Labor Relations Act, the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Farm Labor Contractors Registration Act.

Unfortunately, Mr. Chairman, at this time it would appear that the enforcement of existing legislation would be even more difficult because of Department of Labor budget cutbacks that are being advocated by the Reagan administration.

Finally, I propose an effective border control and interior enforcement program as an essential ingredient of this program. To achieve such control and enforcement, additional funding and staffing for the Immigration and Naturalization Service are necessary. And in this context, the Commission dedicated a significant segment of the report to the necessary improvements that are necessary in improving the technical preparation and cultural sensitivity of the INS staff.

I am fully cognizant, Mr. Chairman, that Congress has previously failed to pass five major sanctions bills. I am also cognizant that there will be an organized campaign to try to defeat any legislation that deals with employer sanctions, in many cases promoted and supported as well as financed by employers' groups.

However, I believe that we face a major emergency in this country and that it is essential that legislation be passed as soon as possible. There are millions of American citizens of Hispanic descent——

Senator SIMPSON. We have a problem with the time.

Mr. OTERO. I'm going to finish.

There are millions of Americans of Hispanic descent and other Hispanics legally residing in the country who are currently the victims of gross and systematic discrimination on the part of employers, who prepare to hire illegal workers because they can be more readily exploited and abused.

So I suggest, Mr. Chairman, in conclusion that in order to correct the problem I support the overall suggestion made by the Commission that there should be a series of steps taken, but employer sanctions without a means for verifying eligibility for employment, in other words an ID system, will not work. And it is my judgment that unless we put into effect a tamper-proof, counterfeit-resistant social security card as the best mechanism for verifying employment eligibility and ending the present system of discrimination, we will not achieve the objective in getting the employer sanction legislation into law.

So I thank you, Mr. Chairman. The rest of my testimony is self-explanatory, and I ask your forgiveness for overstaying my welcome.

[The prepared statement of Mr. Otero follows:]

PREPARED STATEMENT OF JOAQUIN F. OTERO

MY NAME IS JOAQUIN F. OTERO, INTERNATIONAL VICE-PRESIDENT OF THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS AND EXECUTIVE VICE-CHAIRMAN OF THE LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT (LCLAA), A LABOR ORGANIZATION REPRESENTING HISPANIC WORKERS THROUGHOUT THE COUNTRY.

FROM JULY, 1979 TO APRIL, 1981, I HAD THE HONOR OF SERVING AS A MEMBER OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY. ALONG WITH FIFTEEN OTHER AMERICANS ON THE COMMISSION, INCLUDING YOU, MR. CHAIRMAN, I WORKED TO DEVELOP A COMPREHENSIVE AND HUMANE IMMIGRATION POLICY FOR OUR COUNTRY.

THE COMMISSION WAS FORMED TO CONFRONT THE NUMEROUS PROBLEMS TRIGGERED BY RECORD IMMIGRATION AND CONFUSED BY OBSOLETE AND UNENFORCEABLE LAWS. AS THE MOST COMPREHENSIVE, DETAILED AND, CERTAINLY, EXPENSIVE STUDY TO DATE, IT IS THE COMMISSION'S RECOMMENDATIONS WITH PROPOSALS FROM THE ADMINISTRATION AND OTHER GROUPS THAT YOU WILL BE REVIEWING.

THERE ARE NUMEROUS FACTORS RESPONSIBLE FOR THE PRESENCE OF OVER FIVE MILLION ILLEGAL IMMIGRANTS IN THE UNITED STATES. CERTAINLY, POLITICAL INSTABILITY AND LACK OF ECONOMIC OPPORTUNITY IN THEIR HOME COUNTRIES CAUSE THOUSANDS OF PEOPLE TO SEEK NEW LANDS.

RECENT EVENTS IN SOUTHEAST ASIA, KOREA, CUBA AND HAITI TEND TO UNDERSCORE THIS "PUSH" FACTOR IN IMMIGRATION.

IT IS HOWEVER, THE VERY REAL POSSIBILITY OF FINDING WORK HERE THAT POINTS PEOPLE IN OUR DIRECTION. AS THE COMMISSION NOTED IN ITS FINAL REPORT "ALL STUDIES DEMONSTRATE THAT U.S.

ECONOMIC OPPORTUNITY IS THE MAGNET THAT ATTRACTS THOSE WHO ENTER THE COUNTRY ILLEGALLY, REGARDLESS OF THE NATIONALITY OR GENDER."

IN DRS. DAVID NORTH AND MARION HOUSTOUN'S STUDY OF APPREHENDED MIGRANTS, 74.2 PERCENT SAID THEY CAME TO FIND A JOB. IN CORNELIUS' STUDY OF MEXICAN UNDOCUMENTED ILLEGAL WORKERS FROM JALISCO, MEXICO, 77 PERCENT CITED THE NEED TO INCREASE THEIR EARNINGS THROUGH U.S. EMPLOYMENT; ANOTHER NINE PERCENT CITED LACK OF EMPLOYMENT IN MEXICO.

CLEARLY THEN, ILLEGAL IMMIGRANTS COME HERE IN SEARCH OF WORK. THEY UNDERSTAND THAT IF THEY CAN GET ACROSS THE BORDER OR ENTER LEGALLY AND OVERSTAY THEIR VISAS AS IS THE CASE WITH ALMOST FIFTY PERCENT OF ILLEGALS, THERE IS A REASONABLE CHANCE THEY WILL FIND A JOB -- BE IT PICKING FRUIT, WASHING DISHES, WAITING ON TABLES, WORKING ON THE RAILROADS OR IN INDUSTRIAL PLANTS.

THEY ARE ALSO LIKELY TO FIND LOW PAY, LONG HOURS AND DANGEROUS WORKING CONDITIONS. ANY EMPLOYER IS AWARE THAT WHATEVER HE OFFERS ILLEGAL ALIENS, IT IS MORE THAN THEY WOULD HAVE RECEIVED IN THEIR HOME COUNTRIES. MOREOVER, SUCH EMPLOYERS EXPLOIT THE DOCILITY AND THE FEAR OF APPREHENSION OF ILLEGALS.

I STRONGLY BELIEVE, AS THE COMMISSION DID, THAT LEGISLATION FORBIDDING U.S. EMPLOYERS FROM HIRING ILLEGAL IMMIGRANTS SHOULD BE PASSED AS SOON AS POSSIBLE. AS THE COMMISSION NOTED, "THE PRESENT LAW, WHICH MAKES IT ILLEGAL FOR AN ALIEN TO ENTER THE UNITED STATES WITHOUT INSPECTION OR BE HERE WITHOUT PROPER DOCUMENTATION, BUT NOT FOR THAT ALIEN TO WORK AFTER HE HAS ENTERED THE COUNTRY, IS A HOPELESSLY INSUFFICIENT DETERRENT."

TO SOLVE THIS PROBLEM, WE MUST MAKE THE HIRING OF ILLEGAL IMMIGRANTS UNPROFITABLE FOR EMPLOYERS. SPECIFICALLY, I WOULD LIKE TO SEE:

1) CONGRESS APPROVE A STRICT SET OF SANCTIONS AGAINST ALL EMPLOYERS WHO KNOWINGLY HIRE ILLEGAL IMMIGRANTS. I FAVOR CRIMINAL PENALTIES FOR EMPLOYERS WHO ARE REPEAT OFFENDERS.

2) TIGHTER ENFORCEMENT OF SUCH EXISTING LABOR LAWS AS THE FAIR LABOR STANDARDS ACT, THE NATIONAL LABOR RELATIONS ACT, THE FEDERAL INSURANCE CONTRIBUTIONS ACT, THE FEDERAL UNEMPLOYMENT TAX ACT AND THE FARM LABOR CONTRACTORS REGISTRATION ACT.

AT THIS TIME TIGHTER ENFORCEMENT OF EXITING LEGISLATION WILL BE DIFFICULT BECAUSE OF DEPARTMENT OF LABOR BUDGET CUTBACKS BUT THE THREAT OF SEVERE PENALTIES EVEN IF LEVIED ONLY OCCASIONALLY AGAINST VIOLATORS WOULD REDUCE UNSAFE AND UNSCRUPULOUS PRACTICES IN THE WORKPLACE.

3) EFFECTIVE BORDER CONTROL AND INTERIOR ENFORCEMENT ARE ALSO ESSENTIAL. TO ACHIEVE SUCH CONTROL AND ENFORCEMENT, ADDITIONAL FUNDING AND STAFFING FOR THE IMMIGRATION AND NATURALIZATION SERVICE ARE NECESSARY.

WHILE I REALIZE THAT CONGRESS HAS PREVIOUSLY FAILED TO PASS FIVE MAJOR SANCTION BILLS, I BELIEVE THAT WITH PRUDENCE WE CAN BE SUCCESSFUL NOW.

AS THE COMMISSION RECOMMENDED IN ITS FINAL REPORT:

> "AN EFFECTIVE EMPLOYER SANCTIONS SYSTEM MUST RELY ON A RELIABLE MEANS OF VERIFYING

> EMPLOYMENT ELIGIBILITY. LACKING A DEPENDABLE MECHANISM FOR DETERMING A POTENTIAL EMPLOYEE'S ELIGIBILITY, EMPLOYERS WOULD HAVE TO USE THEIR DISCRETION IN DETERMINING THAT ELIGIBILITY. THE SELECT COMMISSION DOES NOT FAVOR THE IMPOSITION OF SO SUBSTANTIAL A BURDEN ON EMPLOYERS... MOST COMMISSIONERS, THEREFORE, SUPPORT A MEANS OF VERIFYING EMPLOYEE ELIGIBILITY THAT WILL ALLOW EMPLOYERS TO CONFIDENTLY AND EASILY HIRE THOSE PERSONS WHO MAY LEGALLY ACCEPT EMPLOYMENT."

MILLIONS OF AMERICAN CITIZENS OF HISPANIC DESCENT AND OTHER HISPANICS LEGALLY RESIDING IN THE COUNTRY, ARE CURRENTLY THE VICTIMS OF GROSS AND SYSTEMATIC DISCRIMINATION ON THE PART OF EMPLOYERS WHO PREFER TO HIRE THE ILLEGAL WORKER BECAUSE HE CAN BE MORE READILY EXPLOITED AND ABUSED.

TO CORRECT THIS WRONG, WE IN THE LABOR MOVEMENT FAVOR USE OF A TAMPER-PROOF, COUNTERFEIT-RESISTANT SOCIAL SECURITY CARD AS THE BEST MECHANISM FOR VERIFYING EMPLOYMENT ELIGIBILITY AND ENDING THE PRESENT SYSTEM OF DISCRIMINATION.

THIS CARD, FAMILIAR TO MOST AMERICANS, WOULD ALLOW QUICK DETERMINATION OF EMPLOYMENT ELIGIBILITY AND MINIMAL DISRUPTION OF EXISTING EMPLOYMENT PROCESSES. EMPLOYERS WOULD BE RELIEVED OF THE BURDEN OF HAVING TO DETERMINE ELIGIBILITY, AND LITTLE DISCRIMINATION AGAINST "FOREIGN" LOOKING CITIZENS WOULD OCCUR.

WE ALSO WANT TO ASSURE STRICTLY LIMITED ACCESS AND APPLICATION TO THE DATA BANK.

THE REAGAN ADMINISTRATION HAS PROPOSED USING DOCUMENTATION ISSUED BY THE IMMIGRATION AND NATURALIZATION SERVICE OR ANY

TWO OF THE FOLLOWING: BIRTH CERTIFICATE, DRIVER'S LICENSE, SOCIAL SECURITY CARD OR REGISTRATION CERTIFICATE ISSUED BY THE SELECTIVE SERVICE SYSTEM.

WE MAINTAIN THAT SUCH PROOF, IS EASILY COUNTERFEITED AND PLACES THE BURDEN OF EVIDENCE ON THE EMPLOYEE.

IT IS THE EMPLOYER WHO IS RESPONSIBLE FOR ATTRACTING THE LABOR IN THE FIRST PLACE. THIS SYSTEM ALSO ALLOWS EMPLOYERS TO DISCRIMINATE AGAINST APPLICANTS FOR WHATEVER REASON THEY PLEASE, BECAUSE THE MULTIPLE ID SYSTEMS GIVE EMPLOYERS DISCRETION FOR DETERMINING THE QUALITY OF PROOF.

IF THE BOSS DOESN'T LIKE YOUR DRAFT CARD, THE PICTURE ON YOUR DRIVER'S LICENSE, OR THE VOWEL AT THE END OF YOUR NAME, HE CAN SIMPLY SAY THAT THE PROOF LOOKS LIKE A FORGERY AND THAT'S THE END OF THE MATTER.

MR. CHAIRMAN, IN ITS FINAL REPORT THE COMMISSION STATED THE LONG-TERM SOCIAL CONSEQUENCES OF A GROWING ILLEGAL ALIEN POPULATION.

- EXPANSION OF AN UNDERGROUND POPULATION WITH NEGATIVE CONSEQUENCES FOR PUBLIC HEALTH, EDUCATION AND THE U.S. CRIMINAL JUSTICE SYSTEM;

- DEVELOPMENT OF A SIGNIFICANT UNDERGROUND POPULATION WITH ATTENDANT CONSEQUENCES FOR PUBLIC HEALTH, EDUCATION AND THE U.S. CRIMINAL JUSTICE SYSTEM;
- GROWING DEPENDENCE ON FOREIGN LABOR TO FILL CERTAIN JOBS SPECIFICALLY RESERVED FOR THEM;

- GRADUAL ACCEPTANCE OF A DUAL SYSTEM OF JUSTICE WITH REGARD TO LEGAL DUE PROCESS AND EQUAL PROTECTION;

- NEGLECT FOR THE LAW IN GENERAL WITH SPECIFIC DISREGARD FOR AN IMMIGRATION LAW THAT PENALIZES THOSE WHO OBEY IT AND WAIT THEIR TURN TO ENTER THE U.S. LEGALLY;
- CONTINUED EXPLOITATION OF THE WORKPLACE WITH PERNICIOUS EFFECTS ON THE HEALTH AND WELL-BEING OF U.S. WORKERS AND THEIR FAMILIES;
- WORSENING OF ETHNIC TENSIONS DUE TO GROWING ACCEPTANCE OF THE IDEA THAT FOREIGNERS ARE TAKING JOBS FROM YOUNG, UNSKILLED, BLACK AND U.S. HISPANIC WORKERS. NOT LONG AGO, FORMER ASSISTANT SECRETARY OF LABOR DON ELISBERG CORRECTLY OBSERVED THAT MANY OF THESE PROBLEMS DERIVE DIRECTLY FROM THE ABSENCE OF ADMINISTRATIVE SANCTIONS. IT IS, HE SAID, THE SHEER ABSENCE OF SANCTIONS AGAINST THE EMPLOYMENT OF UNDOCUMENTED WORKERS, THAT GIVES EMPLOYERS THE ABILITY TO FOSTER AN ATTITUDE OF CONTEMPT FOR THE LAW. IT IS VERY CLEAR THAT UNLESS YOU HAVE A STRONG HOLD ON THE EMPLOYER...YOU CAN'T EVER GET A HANDLE ON THIS PROBLEM.

THAT OPINION WAS, YOU WILL RECALL, MR. CHAIRMAN, REFLECTED ALMOST UNANIMOUSLY BY THE MEMBERS OF THE SELECT COMMISSION. WE DID NOT DIVIDE BY POLITICAL PARTY. WE DID NOT DIVIDE BY ETHNIC ORIGIN. WE BELIEVED WE HAD THE OPPORTUNITY TO SAY SOMETHING IN A UNITED FASHION AND RESPONSIBLE FASHION. NOW, MR. CHAIRMAN, YOUR COMMITTEE AND THIS CONGRESS HAVE THE OPPORTUNITY TO DO SOMETHING IN EXACTLY THE SAME WAY.

MR. CHAIRMAN, I THANK YOU FOR THE OPPORTUNITY TO EXPRESS THE VIEWS OF HISPANIC LABOR IN THE U.S. I CONGRATULATE YOU FOR THE LEADERSHIP YOU HAVE SHOWN IN THE EFFORTS TO REFORM OUR NATION'S IMMIGRATION AND REFUGEE POLICY AND LAWS. I LOOK FORWARD TO HELPING YOU WHEREVER POSSIBLE.

Senator SIMPSON. No, you did not do that. And I recommend that those interested read your supplemental remarks as filed with the Select Commission report, which is, too, a powerful statement as this one was.

Now, Mr. Huerta, the associate counsel of the Los Angeles Office of the Mexican American Legal Defense and Education Fund, MALDEF, please proceed.

STATEMENT OF JOHN HUERTA, ASSOCIATE COUNSEL, LOS ANGELES OFFICE OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (MALDEF)

Mr. HUERTA. Thank you, Senator Simpson, for the opportunity to address this committee hearing. I would like to thank you also for the leadership that you have provided to this very vital issue that is before the American public today. I think that the concern that you have brought to this issue and the level of involvement you have brought to it is tremendous, and it will pay off in dividends in a significant new immigration policy for this country.

I am hopeful that MALDEF can work with you in developing that. Your office has been very sensitive to the needs of minorities, and we are appreciative to be here to be able to voice our concerns about this policy today.

I think the administration ought to be thanked also for their coming out with an immigration policy. While we have some concerns with several aspects of their program, they have tried to put together a comprehensive package to address the situation.

I would like to address my concerns to the employer sanctions proposals that are on the table today. MALDEF's chief objection to employer sanctions is predicated upon the fact that the Hispanic community would suffer increased discrimination not only in the workplace but in all other aspects of our daily life. Our specific objections to the administration's employer sanctions proposals are based on the following grounds:

The proposed provisions will not stem the flow of undocumented migrants. Employer sanctions will result in adverse economic impacts. The fiscal and operational costs of implementing the proposed provisions would be overwhelming. And given the lack of emphasis and meager resources the administration would commit to their enforcement, the proposed employer sanctions would be ineffective. In our view, employer sanctions will be entirely ineffective as a means of preventing illegal immigration into the United States.

Moreover, we believe that their introduction would be likely to exacerbate existing problems associated with the undocumented population. Assuming that an employer sanctions program could be effective—and we have concerns that the analysis must involve not only the push factors taking place in terms of the lack of economic opportunity in sending countries, but also additional pull factors such as the need for family reunification—assuming that an employer sanctions program could be effective in deterring the hiring of undocumented immigrants, the likely immediate outcome would be an increase in domestic unemployment and higher inflation.

I have a long quote in my statement from Mr. Roger Waldinger, an MIT economist who has written a paper called "The Case Against Employer Sanctions. I only have one copy of that, but I would like to submit his entire article for the record. And I will give a short summary.

Basically, his point is that in cases of low-wage manufacturing, many of the entrepreneurs in this area are in a very vulnerable situation in terms of international competition. If you think of the garment industry, it may be a good example in which in southern California, it's a $3.8-billion industry. It employs many undocumented. It has been estimated between 65 and 70 percent.

It has also been stated that it is not likely that many of these could afford to pay high wages and that many of their companies may go bankrupt or either go overseas and withdraw, thereby causing domestic unemployment to the other 35 or 40 percent domestic citizen employees that they have in the industry. Also, that will tend to increase inflation.

Besides contributing to an increase of unemployment and inflation, there are other costs associated with an employer sanctions program. What are the costs to the private sector in implementing and enforcing a federal employers sanction provision? The Social Security Administration statistics for 1977 indicate that over 40 million persons took new jobs or entered or reentered the labor market that year. Assuming that it would take 15 minutes per hire—and I think OMB came up with a figure of 30 minutes per hire—for an employer to check the proper documentation and make the necessary certification, it would cost the private sector 10 million hours per year to comply with the law. At a conservative estimate of $10 per hour, that amounts to $100 million per year in nonproductive work, not counting inventory and time allotted for inspection.

The cost to the public sector will depend on how serious the Government is about enforcing the proposed statute. Estimates range from $40 million for an affidavit system to $850 million per year for a national ID card system.

Ms. Meissner in her testimony indicated that might be $2 billion for a startup and over a period of years to implement that card system. Will the Government be serious about enforcing employer sanctions? The high costs in terms of unemployment, inflation, and nonproductive public and private sector participation lead one to believe that a new Federal employer sanction law will not be consistently enforced by this or any other administration.

The Federal Farm Labor Contractor Registration Act, which provides for the suspension or revocation of federally licensed farm labor contractors who hire undocumented workers is not adequately enforced by the U.S. Department of Labor.

According to the research of the General Accounting Office, 11 States have adopted legislation penalizing employers for hiring undocumented aliens. Their investigation reviewed that only one employer in all of the 11 States was fined $250 for hiring an undocumented worker.

Our community is somewhat cynical about the lack of enforcement of immigration laws, of civil rights laws, of labor laws, and we are fearful that employer sanctions laws which will create the potential for discrimination in our community will not be adequately enforced and, therefore, we will be running the risk of being denied jobs in certain sectors of the economy but in other ones, the hiring of undocumented will continue.

So that lack of adequate enforcement is one of the real problems that we have with this.

Because of lack of time, I will save the remainder of my comments for my testimony on Friday.

Senator SIMPSON. Fine. We will have time for questions.

[The prepared statement of John Huerta follows:]

PREPARED STATEMENT OF JOHN HUERTA

My name is John Huerta, and I am the Associate Counsel for the Los Angeles office of the Mexican American Legal Defense and Educational Fund. MALDEF is a national civil rights organization dedicated to the preservation and vindication of the civil and constitutional rights of close to 15 million Americans of Hisapnic descent. Currently, we have offices in San Francisco, Los Angeles, Denver, Chicago, San Antonio and here in Washington, D. C. For the past several years, much of our work has been concentrated in the areas of employment, education, immigration and voting rights. Given the nature of our work, we are keenly aware of the significance of the issues before this subcommittee today and appreciate the opportunity to testify at these hearings.

Our President and General Counsel, Vilma S. Martinez, testified on May 6, 1981 before the Joint Senate/House Hearings on Immigration and at that time provided the Committee with a thorough and detailed analysis of MALDEF's position on employer sanctions and other often-debated immigration proposals.

On July 30, 1981, the Reagan Administration proposed a set of immigration reforms aimed at solving this country's immigration problems. The proposals include provisions for increased enforcement of existing immigration laws, sanctions against employers who knowingly hire undocumented workers, a temporary worker program for Mexican nationals and the creation of a "renewable term temporary resident" status for undocumented immigrants who were present in the U.S. prior to January 1, 1980.

MALDEF commends the President for his efforts to address this complex and emotionally laden issue. On their face, the Administration's immigration proposals appear to be reasonably humane attempts to deal with the so called "illegal alien" problem. Upon close scrutiny, however, the Administration's package falls far short of its professed goals. MALDEF has serious reservations about many of the proposals. But,we will limit our comments today to our concerns regarding the Administration's employer sanctions proposal.

The concept of punishing an employer who hires undocumented immigrants is not novel. As those who have worked in immigration reform well know, employer sanctions provisions have been introduced in one form or another for over a decade. They have been rejected repeatedly on the grounds that they are unworkable, unmanageable, costly, and discriminatory. Nothing has changed which would lead us to believe that these objections do not apply to this new proposal.

As in the past, MALDEF's chief objection to employer sanctions is predicated on the fact that the Hispanic community would suffer increased discrimination not only in the work place but in all other aspects of our daily life. Vilma Martinez, our President and General Counsel, has already expressed our general views during her testimony on May 6, 1981 before the Joint Senate/House Immigration hearings.

Other specific objections to the Administration's employer sanctions proposals are based on the following grounds: (1) the proposed provisions will not stem the flow of undocumented migrants; (2) employer sanctions will result in adverse economic impacts, (3) the fiscal and operational costs of implementing the proposed provisions would be overwhelming, (4) given the lack of emphasis and meager resources the Administration would commit to their enforcement, the proposed employer sanctions would be ineffective, and (5) the potential for discrimination is significant.

In our view employer sanctions will be entirely ineffective as a means of preventing illegal immigration to the United States. Moreover, we believe that their introduction would be likely to exacerbate existing problems associated with the undocumented population.

Underlying employer sanction proposals are the false assumptions that undocumented immigrants are lured here solely by job opportunities, and that penalizing employers who hire them will deter the flow. This, however, is a dangerously oversimplified analysis of the situation. It totally ignores the "push" factors which exist in the countries that supply many of our undocumented population. Studies have demonstrated that the absence of economic opportunity in source countries is often severe enough to spur migration to the U.S. even where job opportunities are closed to the undocumented immigrants.

Equally lacking in this analysis is consideration of other non-job-related "pull" factors which contribute to illegal migration. For instance, the desire to reunite with family members already present in the U.S. is much stronger than the disincentive of lack of jobs. To someone fleeing conditions of extreme poverty and destitution, the perceived standard of living of the general American population will remain extremely alluring despite risks attendant to seeking work here.

Thus, when all factors are scrutinized, employer sanctions, if successful in preventing employment of aliens, would do more harm than good. They would attempt to close off the U.S. labor market to undocumented immigrants, but would not stop illegal migration to the U.S. Rather than eliminating the underclass of undocumented workers presently in the U.S., employer sanctions would lead to the creation of an underclass of unemployable immigrants. This would have not only negative effects on the immigrants themselves, but portends serious impacts on our economic and social well-being.

Assuming that an employer sanctions program could be effective in deterring the hiring of undocumented immigrants, the likely immediate outcome would be an increase in domestic unemployment and higher inflation. Roger Waldinger, an M.I.T. economist, projects:

> "In the case of low-wage manufacturing, a disruption of existing labor supplies is likely to further hasten the erosion of domestic employment and to heighten the vulnerability of these industries to international competition. Since undocumented workers generally are employed in low-level positions that are complementary to higher-level jobs occupied by natives or older immigrants, such an outcome would have an adverse effect on domestic employment....
>
> In the case of nonmanufacturing, where the jobs cannot be exported, the outcome is likely to take a somewhat different form. As in manufacturing, an effective restriction on immigrant labor would raise the wages of unskilled labor. Given the relative rigidity of wages, this would lead to readjustments at higher wage levels, thus accelerating inflation. The probability of an inflationary effect is enhanced by the difficulties encountered in substituting machinery for labor in services and retailing. Furthermore, much of the recent increase in service employment reflects the "contracting-out" of services previously provided within and by the household.

> If a reduction in labor supply were to increase the real costs of providing these services in the market, they could be internalized to a significant degree, thus provoking an additional decline in employment."[1]

Besides contributing to an increase in unemployment and inflation, there are other costs associated with an employer sanctions program. What are the costs to the private sector in implementing and enforcing a federal employer's sanction provision? The Social Security Administration's statistics for 1977 indicate that over 40 million persons took new jobs or entered or re-entered the labor market that year. Assuming that it would take 15 minutes per hire for an employer to check the proper documentation and make the necessary certification, it will cost the private sector 10 million hours per year to comply with the law. At a conservative estimate $10 per hour, that amounts to $100 million dollars per year in non-productive work not counting inventory and time allotted for inspection.

The cost to the public sector will depend upon how serious the government is about enforcing the proposed statute. Estimates range from $40 million for an affidavit system to $850 million for a national I.D. card system.

But will the government be serious about enforcing employer sanctions? The high costs in terms of unemployment, inflation, and non-productive public and private sector participation, lead one to believe that a new federal employer sanction law will not be consistently enforced by this or any other administration. The Federal Labor Contractor Registration Act[2] which provides for the suspension or revocation of federally licensed farm labor contractors who hire undocumented workers is not enforced by the U.S. Department of Labor.

According to the research of the General Accounting Office, eleven states have adopted legislation penalizing employers for hiring undocumented aliens. Their investigation revealed that only one employer in all of the 11 states was fined $250 for hiring an undocumented worker.[3]

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[1] Roger Waldinger, The Case Against Employer's Sanctions, Joint Center for Urban Sudies of MIT & Harvard University, Cambridge, Mass. (March 1980).

[2] 7 U.S.C. §2043(a) (1976).

[3] General Accounting Office, Report to Congress by the Comptroller General "Prospects Dim for Effectively Enforcing Immigration Laws" (Nov. 5, 1980), p. 8.

Hispanics are cynical about the non-enforcement of federal laws dealing with immigration, civil rights, minimum wage, and working conditions. The Administration is proposing yet another law to add to that cynicism.

The Reagan employer sanction plan lacks any enforcement mechanisms. It relies primarily on the good faith of the employer. Unless the Administration plans to further develop its proposal, we must discard it as a sham--designed to give the impression that employers will be punished for hiring undocumented workers. We will, in essence, be maintaining the status quo, but with more bureaucracy, paperwork and opportunity to discriminate against Americans who "look foreign".

For the Hispanic community, employer sanctions also constitute a serious threat to our civil and constitutional rights. The potential for discrimination is real. The fear that our community presently feels can neither be disregarded nor characterized as unfounded.

For Hispanics and other Americans who share the physical characteristic of persons thought to constitute the bulk of the undocumented population, employer sanctions will undoubtedly exacerbate existing patterns of employment discrimination. Well meaning employers, fearful of government sanctions and government intervention, will shy away from hiring individuals who appear "foreign". Racist or biased employers will simply use the "fear" of sanctions as an excuse to avoid hiring qualified minorities. And those unscrupulous employers of four or fewer employees who hire undocumented workers will be exempt from coverage.

Even more disturbing is an assumption made by the Administration and those who support his provision that the employer sanction requirements will be limited to the work place. Present realities tell us that this is not so. The potential for using this provision as a harrassment tool against Hispanics and others is significant. Two recent events illustrate our fears. On August 20, 1981, an Hispanic photographer was covering a demonstration at the Los Angeles Federal Building. An Immigration officer proceeded to harrass him and asked for proof of his citizenship or legal resident-alien status. When provided with his immigrant card, the officer copied the serial number and proceeded to misinform the photographer about the legality of his immigrant status. This incident was followed by a second stop on August 28, 1981, in which the Immigration officers tried to destroy the photographer's film. This particular photographer happens to be the employee of Ignacio Lozano, Jr., editor and publisher of La Opinion, and former U.S. Ambassador to El Salvador under the Ford Administration. The case is presently under investigation by the U.S. Attorneys office in Los Angeles. In the second instance a Puerto Rican returning from Santo Domingo was detained and jailed for six days because an immigration officer would not accept his birth certificate, driver's license, social security card and membership card from the International Union of Electrical Workers, as proof that he was an American citizen.

I submit for the record, newspaper accounts of the two incidents cited above.

Certain proponents of employer sanctions maintain that the problems delineated above would be eliminated if the proposals included a worker identification card. We disagree with such a notion and find a wide range of problems with such an identification system. However, we will reserve further comment until October 2nd, when we will testify before this Committee on that particular issue.

THE CASE AGAINST EMPLOYER'S SANCTIONS

Roger Waldinger

In the debate over undocumented immigration, employer sanctions have been widely propounded as a method to "curb the flow." The imposition of penalties on employers of undocumented aliens was a key component of legislation that emerged out of the House Judiciary Committee several years ago; comparable penalties have been enacted by several states on their own initiative; they were incorporated into the now-abandoned legislative package developed by the Carter administration in 1977; and penalties rank highest on organized labor's agenda in the immigration field.

It is the contention of this paper that despite this wide concensus on the desirability of penalties, employers' sanctions is an ill-conceived measure that is unlikely to alleviate the problems it seeks to redress, and holds greater potential for harm than for good. There are three key arguments: (1) Undocumented immigration derives primarily from a complex of domestic inducements (the demand for low-wage labor) and constraints (limitations on the domestic low-wage labor supply). Employer sanctions will not alter these dynamics. (2) Employer sanctions will conflict with other labor market policies, principally labor standards' policies designed to control the low-wage sector. Employer sanctions will inhibit worker initiative in reporting violations and will aggrevate an already-existing tendency to deviate from the labor codes. (3) Employers' sanctions is essentially a piece of symbolic legislation, designed to deal with symptoms rather than causes. As such, its fate will conform to the historical pattern: encourage cynicism towards governmental practices and intentions in an area deeply beset by problems of normative regulation.

The perspective adopted here suggests that any set of measures designed to "curb the flow" of undocumented immigrants must be linked to broader labor market considerations. Inequities in the job and occupational structure have historically been a catalyst to immigration; there is no evidence to suggest that immigration can be diminished so long as these inequities persist. At present, there are severe pressures that reinforce the structure of low-wage employment; modifying those pressures would require a different set of labor market and industrial policies than those that currently prevail. Ultimately, then, the problem is not one of people but of jobs; "curbing the flow" can best be accomplished by tackling the economic difficulties that confront us at home.

The case for employer sanctions rests on a particular argument about undocumented immigration where the central contention is that the immigration of undocumented workers is caused by conditions in the sending countries. From this derives a set of views about the effects of undocumented workers in the labor market. In the baldest form, as stated by former INS Commissioner Chapman and others during the early stages of the immigration debate, the displacement of native workers by undocumented workers greatly aggravated unemployment, particularly among minority workers and youth who were in direct competition with the immigrants. More recently, Secretary of Labor Marshall has voiced a similar view, maintaining that unemployment would fall below the four percent level were it not for the presence of undocumented workers.[1]

The alternative case for sanctions is based on a somewhat subtler rationale. This view abandons the notion of one-on-one competition or substitution. Rather than arguing that undocumented workers directly take jobs away from American workers, it is asserted that displacement of natives is a second-step effect of undocumented workers. That argument takes the following form: undocumented workers loosen an already loose labor market; they accept low paid, physically demanding, and dead-end jobs thereby forestalling change in the secondary labor market; and thus is engendered, as in a "self-fulfilling prophecy," a two-class labor market where the bottom half contains jobs that no American will accept.[2]

By the logic of either argument, sanctions is an effective measure to restrict access to the U.S. labor market, and thereby reduce the incentives for undocumented immigration. In one version, sanctions will induce employers to hire back workers of native orfgin whom the undocumented presumably had earlier replaced. In the second version, sanctions will exercise a comparable effect, albeit indirectly, by tightening the labor market. Once made dependent on recruiting and retaining native workers, employers will in turn be compelled to lift wages and conditions.

What is the likelihood of either outcome? In light of the employment pattern of undocumented workers, the probability is slight indeed. Despite highly publicized claims to the contrary, survey data indicates that undocumented workers are employed at the bottom of the occupational ladder. As studies by Cardenas, Cornelius, North and others have shown, undocumented workers are primarily relegated to unskilled, low-paying jobs where, it should be added, their rates of pay frequently fall below those of comparably employed natives.[2a]

Unlike the proppnents of sanctions, we would argue that this pattern reflects the playing out, not the distortion, of domestic market forces. While the economy generates a large number of low-wage jobs, there is a constant tendency for the supply of domestic labor to be undermined. The use of immigrant workers to man the jobs that native workers either cannot or will not accept is the response.

The uneven development of the U.S. economy provides a powerful inducement for undocumented immigration. In manufacturing, a substantial proportion of the workforce remains concentrated in traditional, labor intensive industries where low-wages and unstable employment prevail. Despite technological advances and the adverse effects of international competition, the low-wage share of the manufacturing has dwindled at a relatively slow pace. In the 1960s, the low-wage manufacturing workforce actually increased, though, as Delehanty and Evans, and Steward have shown, the low-wage share of manufacturing remained stable at roughly twenty-five percent. During the past ten years, when manufacturing employment stagnated, the low-wage sector shrank. Nonetheless, eighteen percent of the manufacturing workforce was still employed in low-wage industries as of 1978.[3]

In non-manufacturing, the low-wage component is proportionately larger. Low-wages prevail in retail and in most service industries; only fifty percent of the workers in service and thirty-seven percent of those in retail were employed full time, full year during 1978. Excluding workers employed in such higher paying service industries as advertising, legal, engineering, and accounting, these two groups comprise fifty-two percent of the non-manufacturing labor force.

Though the shift from manufacturing to services has fueled growth at the top of the occupational ladder, bottom-level employment has followed suit at an extremely rapid pace. More than twice as many people are working as cooks, hospital attendants, or guards today, for example, than there were twenty years ago. In other dead-end, relatively unskilled occupations — waiting, childcare, cleaning, and dishwashing — the increase has been comparably swift. The critical implication of these trends is that employment in the low-wage sector is not a transitory artifact of decay in aging, peripheral industries. Rather, low-wage industries are as modern as high technology, reflecting societal dynamics that are difficult, if not impossible to contain.[4]

The low-wage sector has historically drawn upon migrant workers to fulfill its labor demands. During the "second industrial revolution" at the turn of the century, the steady flow of immigrants swelled into a torrent. More than a million immigrants arrived between 1905 and 1913; in industries like textile, steel, coal, and garments their numbers accounted for well over 50 percent of the workforce. As World War I curtailed the availability of workers from overseas, new sources of labor were explored. Internally, industry tapped the large reserves of displaced white and black agrarians. Like their immigrant predecessors, the internal migrants were channeled in the job market's bottom tier. The employment patterns for both black and white migrants strongly resembled the job configuration revealed by the undocumented today. In the Southwest, and to a lesser extent, in the industrial heartland, the cessation of European immigration led to an external replacement as well. Railroads, mines, steel mills, and particularly ranches organized recruitment across the Mexican border, laying the seed for the expanded migration chain of today.[5]

The point of this historical excursion is to underline the continuity in the use of migrant labor and to suggest the reasons for the current shift in supply. There are two chapters to the story of the supply side. The first concerns the shift in the sources that traditionally fed into the bottom of the U.S. labor market, most notably, the metamorphosis of the South. A net exporter of people since the 1880s, the South's net outflow substantially dropped by the last five years of the 1950s. By the next decade, the balance of migration shifted substantially upwards: between 1965 and 1970, the South made a net gain of 558,000 people. By the mid-1970s, the exodus of poor migrants came to a halt as well: between 1975 and 1977 the South experienced a net inflow of poor migrants.

Of equal importance, the patterns of minority group migration have been transformed — a phenomenon of no small import given the historic dependency of the low-wage sector on minority group labor. While net white migration from the South came to a halt in the 1950s, black outmigration continued to exceed the black inmigration wave. However, the size of the inmigrating population grew steadily between 1940 and 1970. By the latter date, the southern-bound contingent was 45 percent as large as its northern-bound counterpart. In the 1970s, however, the Black exodus from the South finally came to a halt; in the early 1970s, one and a half times as many Blacks moved South as did North. The shift in Puerto Rican migration is the other case of note. Recruited as contract laborers during World War II, Puerto Rican migration to the mainland rose steeply in response to post-war shortages in the low-wage sector and inducements to serve as a supplementary labor force. By the 1960s, net migration tapered off; the latest data for the 1970s indicate that the number of return migrants to Puerto Rico exceeds the number of the mainland-bound.[6]

The second part of the story concerns the experiences of these migrants in the receiving communities. Employment at the bottom of the occupational ladder was compatible with the needs and aspirations of those who saw themselves as sojourners, interested in accumulating savings in order to return home. The same held true for those who settled, since they evaluated their status and earnings relative to conditions prior to migration and not to the norm in the U.S.

If initially there was a match between the jobs in the low-wage sector and the work orientations of the migrants, that linkage attenuated over time. As early as 1960, Black southern-born migrants residing in northern cities were more heavily concentrated in low-status occupations but were nonetheless more likely to be employed, less likely to be entirely out of the labor force, and more likely to be actively looking for a job if not employed than were their northern-born counterparts. Despite higher levels of education, the northern-born attained negligibly higher income levels than the southern-born; among the less educated, there was a clear differential in favor of the migrants. Similar patterns prevailed in 1970s. Furthermore, data for this date indicate that northern-born blacks were more likely to be on welfare than were southern migrants living in the north. Puerto Rican attachment to the labor force followed a similar course. Labor force participation slipped among male and female workers during the 1960s. Female Puerto Ricans rapidly dropped out of the manufacturing labor force, their point of concentration at the time of peak migration, and their labor force participation rates took a precipitous fall.[7]

Thus, the catalytic agents for the entry of undocumented workers into the labor market derive from the internal supply of low-wage labor. The incompatibility between the job characteristics of the low-wage sector and the work orientations of the second generation has made the low-wage sector dependent on fresh source of migrant labor. However, with the emergence of the South as a migrant-importing region, the reversal of Black migration, and the cessation of Puerto Rican migration to the mainland, the supply of domestic workers for low-level occupations seems to have been irremediably undermined.

What becomes of the case for employers' sanctions in light of this analysis? From the perspective elaborated here, employers sanctions is a response to a problem that has been misdiagnosed. The issue is not one of people, but of jobs. The characteristics of jobs in the low-wage sector are now, as they have been historically, a catalyst to the use of migrant labor. As recent migratory patterns shifted and as the aspirations and behavioral patterns of former migrant groups lost compatability with low-wage work, the need for a new source of migrant labor was asserted. The jobs have persisted, while the workforce has been transformed.

At this point, it is worth asking what would happen to these jobs if the migrant flow were cut off. In the case of low-wage manufacturing, a disruption of existing labor supplies is likely to further hasten the erosion of domestic employment and to heighten the vulnerability of these industries to international competition. Since undocumented workers generally are employed in low-level positions that are complementary to higher-level jobs occupied by natives or older immigrants, such an outcome would have an adverse effect on domestic employment. Moreover, a policy that would undermine labor-intensive industries would be in conflict with other trade and manpower policies that have been enacted to reinforce the position of these very industries. In the case of nonmanufacturing, where the jobs cannot be exported, the outcome is likely to take a somewhat different form. As in manufacturing, an effective restriction on inmigrant labor would raise the wages of unskilled workers. Given the relative rigidity of wages, this would lead to readjustments at higher wage levels, thus accelerating inflation. The probability of an inflationary effect is enhanced by the difficulties encountered in substituting machinery for labor in services and retailing. Furthermore, much of the recent increase in service employment reflects the "contracting-out" of services previously provided within and by the household. If a reduction in labor supply were to increase the real costs of providing these services in the market, they could be internalized to a significant degree, thus provoking an additional decline in employment.

This scenario suggests that enforcing employers' sanctions will be an exceedingly hard row to hoe. Since penalties will not inflict pain on the undocumented workers alone, the will to enforce is bound to bend before the resistance of native workers and employers alike. The best prospect, then, is that a penalty on employers of undocumented aliens becomes a dead letter in the law. That the outcome of sanctions might be less benign than this is the argument taken up below.

One of the saving graces of the confusion afflicting immigration policy is that the undocumented alien, though barred from accepting employment, nonetheless enjoys certain rights on the job. Up to now, the undocumented worker has been guaranteed certain basic protections afforded all members of the labor force: a minimum hourly wage, safe and healthy working conditions, a premium for overtime, and so on. Under a series of rulings from the National Relations Board, the right of the undocumented worker to exercise a voice over wages and working conditions has even been affirmed. In the translation from theory into practice, many of these rights have been chipped away. There is ample evidence of widespread violations of basic labor standards in industries where large numbers of undocumented workers are employed. And it is the experience of a growing number of unions that the undocumenteds' right to organize is often undermined.[8]

Though the voice that undocumenteds currently raise in defense or protest may be reduced to a whisper, existing protections still present an obstacle to the erosion of standards at the bottom of the labor market. Every major immigration proposal has been particularly cognizant of this question. As part of its 1977 immigration package, the Carter administration proposed to intensify enforcement in the labor standards field. Despite the subsequent abandonment of this legislation, this recommendation has actually been followed through in the form of a concentrated investigative effort in the Wage and Hour Division, the "Employers of Undocumented Workers Program." Organized labor, moreover, has made stepped-up enforcement of labor standards a major component of its proposals in the immigration field.

Employer sanctions, however, are likely to doom any such efforts. Sanctions will effectively silence the voice that undocumented workers can presently exercise by putting into conflict the undocumented workers' desire to improve working conditions while holding on to the job. Moreover, sanctions are likely to increase the incentives for employers to abuse the labor codes. The potential for harm is particularly grievous, since government authority in the field is already handicapped and non-compliance among employers of undocumented workers is widespread.

Compliance with wage and hour standards rests in the hands of the Wage and Hour Division of the U.S. Department of Labor, which has jurisdiction over 2.4 million workplaces. This broad mandate, however, is in sharp discrepancy with its limited resources. With 1,100 compliance officers on staff, the division can make approximately 80,000 investigations a year; consequently, its activities are undertaken almost entirely in response to complaints.

The Division confronts serious enforcement problems. During fiscal 1979, the Labor Department uncovered a record 147 million dollars in wage nderpayments — an increase of 60 percent over the preceding year. There is considerable evidence to suggest that non-compliance is extensive among firms that elude inspection; the director of the Employment Standards Administration himself estimates compliance at only 60 percent. Undoubtedly, non-compliance is only partially linked to the presence of undocumented workers. But there is a growing body of evidence pointing to substantial erosion of standards in industries with high concentrations of undocumented workers. The most damaging picture has emerged from an intensive investigation of low-wage industries in Southern California, conducted by a special branch of the California Department of Labor. Of 3,253 workplaces investigated between 1978 and 1979, fifty-nine percent were found to be in violation of standards covering the minimum wage, overtime, industrial homework, and child labor. More recently, the Wage and Hour Division program that has been targeted on "Employers of Undocumented Workers" has uncovered an alleged 36.1 million dollars in backwages due 212,000 employees. As of December 1979, sixteen million dollars had been recovered for 142,000 workers.[9]

Standards covering safety, health, and factory working conditions fall under the purview of the Occupational Safety and Health Administration on the federal level, and a series of different agencies on the state and local level. There is good reason to think that regulatory problems in this field are equally severe. OSHA operates within a cost-benefit calculus that leads it to focus on high hazard industries or on serious violations where there may be imminent danger. What this means in practice is that there is no routine surveillance of the "lowrish" industries where the immigrants congregate. Although it is OSHA's declared policy to respond to all complaints, it is agency practice to restrict the percentage of staff dealing with complaints to no more than 30 percent. Moreover, enforcement in industries where the threat to workers' health and safety is grave, but not the most severe is likely to be crippled by passage of the pending Schweiker amendment.

The enfeeblement of governmental authority, coupled with heightened resistance from employers on a broad front, suggests what there is to fear from employers' penalties. Given the constraints which presently govern wage and hour operations, a continuous flow of complaints is the sole guarantor of a minimally acceptable level of enforcement. Even if field activity were to be intensified -- a prospect that appears exceedingly dim in view of the current political climate -- complaints would retain a vital function.

The advent of employers' sanctions would clearly chill these information flows. It is difficult to imagine why an undocumented worker would report a wage of hour abuse to any organization -- be it church, social service, labor, or government -- if the investigation of that complaint would eventuate in the loss of his or her job. Nor can one contemplate an organization eliciting governmental intervention in labor standards issues if that action would put the job of the recipient of aid at risk. And it should be noted that wage and hour officials currently experience great difficulty in eliciting cooperation from immigrant workers, in part because information is exchanged with the INS. Presumably, cooperation would not be enhanced by the advent of sanctions.

If sanctions are likely to inhibit the exercise of workers' rights, they may well lead employers to further depart from the labor codes. At the present time, the employer of undocumented workers stands unblemished in the eyes of the law: legal opprobrium, of course, falls on the worker instead. Thus, despite the current inadequacies that beset investigation and enforcement in the labor standards field, the balance of risk faced by the employer of undocumented workers still stands in favor of compliance.

Were sanctions to be enacted, however, this calculus would shift. Hiring and employing undocumented workers would now become a punishable violation. For the employer who decides to run this risk and hire an undocumented worker — a likely enough possibility in light of the arguments advanced above about the relative shortage of domestic labor — the incentives to conform to wage, hour, and working standards would be correspondingly reduced. The risks involved in disregarding wage and hour laws would simply be additional to those already incurred. Secondly, their relative weight would be lessened by the profits to be gained by sharply reducing labor costs.

Sanctions are likely to have an additional, adverse effect on the activities of organized labor. Organizing of undocumented workers will be perforce curtailed, if not prohibited. Furthermore, unions with undocumented members will confront severe ethical, if not legal, dilemmas. In a number of low-wage industries, unions operate hiring halls or perform comparable functions in job placement. Presumably, under sanctions, the unions themselves will be obliged to request identification from members and will be barred from placing an undocumented member on a job.

Thus, sanctions are likely to exercise unexpected effects: in the scenario envisioned here, the cure is liable to be far worse than the disease. Sanctions will undermine the few protections that provide a measure of defense to the undocumented worker and impede effective regulation of labor standards, all the while providing a powerful catalyst for the growth of an underground sector.

Before the case against sanctions is closed, one final point need be made. The implications of sanctions must be traced beyond the labor market. While sanctions may not reduce the flow of undocumented immigration, they will reinforce the pressures that keep that current largely underground. Certainly, the wisdom of any policy that encourages a large group of otherwise law-abiding people to systematically remove themselves from contact with the government and public bodies is open to question.

Secondly, there is a question of what employers' sanctions signifies. It is attractive because it serves as such a clear statement of intent and is an easily-understood measure that appears relatively straightforward to implement. However, if the deficiencies of employers' sanctions are as severe as they are made out to be, then the symbolic effect is of quite a different kind. As a paper law, employers' sanctions will generate a further tide of public cynicism toward policy making that we can ill afford.

One of the major impulses to immigration reform is the desire to bridge the often yawning gap between law and practice in the field. It follows from the arguments developed in this paper, that the enactment of employers' sanctions will not serve well in that cause.

Notes

1. For Marshall's recent statement, see *The New York Times*, December 3, 1979. For a more extended statement of his views, see F. Ray Marshall. "Economic Factors Influencing the International Midgration of Workers" in Stanley R. Ross, ed. *Views Across the Border: The United States and Mexico*. Albuquerque, N.M.: University of New Mexico Press. 1978.

2. This is summarized from North and LeBel's argument in: David North and Allan LeBel. *Manpower and Immigration Policies in the United States*. Special Report of the National Commission for Manpower Policy. No. 20. 1978. pp. 158-163.

2a. For the employment patterns of undocumented workers, see, for example: Gilbert Cardenas. "The Manpower Impact and Problems of Mexican Illegal Aliens in an Urban Labor Market." Unpublished Ph.D. dissertation. University of Illinois. 1977. pp. 90-110. Wayne Cornelius. *Mexican Migration to the United States: Causes, Consequences, and U.S. Responses*. M.I.T.: Center for International Studies. 1978. pp. 52-71. David North and Marion Houstoun. *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study*. Washington, D.C.: Linton and Co. 1976.

3. Charles T. Stewart. *Low Wage Workers in an Affluent Society*. pp. 13-61. For 1978, the following industries were considered low wage: textile (SIC 22); apparel and other textile products (SIC 23); lumber and wood products (SIC 24); furniture and fixtures (SIC 25); leather products (SIC 31).

4. U.S. Bureau of the Census. *Census of the Population*. 1960. 1970. U.S. Department of Labor. *Employment and Earnings*. January 1980.

5. Stanley Lebergott. *Manpower and Economic Growth*. New York: McGraw Hill. 1964. pp. 510-511. Harold Wool with Bruce Phillips. *The Labor Supply for Low-Wage Occupations*. New York: Praeger. 1976. pp. 37087. Mark Reisler. *By the Sweat of Their Brow: Mexican Immigrant Labor in the U.S., 1900-1940*. Westport, Conn.: Greenport Press. 1976.

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7. Stanley Lieberson and Christy Wilkinson. "A Comparison between Northern and Southern Blacks Living in the North." *Demography*. Vol. 13, no. 2. 1976. Larry H. Long. "Poverty Status and Receipt of Welfare among Migrants and Non-Migrants in Large Cities." *American Sociological Review*. Vol. 39, no. 1. 1974. Larry H. Long and Lynne R. Heltman. "Migration and Income Differences between Black and White Men in the North." *American Journal of Sociology*. Vol. 80,

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8. For a description of the problems encountered in organizing undocumented workers, see: Bruce Koon. "Instead of Turning in Illegal Aliens, Some Unions Try SIgning Them Up." *Wall Street Journal*. 11/13/79.

9. Sar Levitan and Richard S. Belous. *More than Subsistence*. Baltimore: Johns Hopkins University Press. 1979. pp. 46-51. Edward Gramlich. "Impact of Minimum Wages on Other Wages, Employment, and Family Incomes." Brookings Papers on Economic Activity. 2: 1976. pp. 422-24. Statement of Donald Elisburg, Assistant Secretary of Labor. Hearings of the Select Commission on Immigration and Refugee Policy. New York, January 21, 1980. *U.S. News and World Report*. "Return of Sweatshops: They Flourish Anew." January 14, 1980.

10. This elaborates the argument made by Michael Piore in "The Illegal Alien Debate Misses the Boat." *Working Papers for a New Society*. March/April 1978.

[From the Los Angeles Times, September 1981]

FBI PROBES IMMIGRATION AGENCY ON RIGHTS CHARGE

(By Marita Hernandez)

The FBI is investigating allegations that U.S. Immigration and Naturalization Service officers violated the civil rights of a Mexican-born photographer who is employed by a Los Angeles newspaper while he was trying to do his job.

The investigation, it was learned Thursday, began after the Spanish-language newspaper, La Opinion, registered a complaint with the U.S. attorney's office this week, alleging that on two recent occasions immigration officers stopped photographer Octavio Gomez from taking pictures and asked for proof of his legal immigrant status without probable cause to suspect he was in this country illegally.

The newspaper also filed a complaint Thursday on the matter with the U.S. Commission on Civil Rights.

Ignacio Lozano Jr., editor and publisher of La Opinion and former U.S. ambassador to El Salvador under the Ford administration, accused the immigration agency of "overt harassment" against Gomez, a Mexican alien resident.

According to Lozano, Gomez, an employee of the newspaper for more than a year, had his first encounter with immigration officers on Aug. 20, while he was photographing a group of nuns near the Federal Courthouse downtown. The nuns were trying to stop the deportation of Salvadoran refugees by agency officers.

Lozano also accused the agency of "retaliatory" action against the newspaper when, on Wednesday—the day after its complaint to the U.S. attorney's office—immigration officers apprehended two undocumented construction workers at the newspaper. The workers were not employees of the newspaper, but were hired by a contractor to do remodeling work on the building's exterior.

"I don't consider it a coincidence," Lozano said. "We've been here 55 years and this is the first time that the INS has conducted a sweep in the vicinity.",

Omer G. Sewell, agency deputy district director, Thursday refused to comment on Lozano's charges, other than to maintain that the apprehension of the two workers was "purely coincidental."

Regarding the other charges involving Gomez, Sewell said: "I don't think it warrants much conversation. It's pretty routine.'"

In refusing to comment on the issue, Sewell said his office had not been alerted by the U.S. attorney's office about the allegations. A spokesman for the U.S. attorney, however, said that immigration district director Michael Landon was contacted Wednesday about the matter.

TURNED OVER TO FBI

U.S. Atty. Andrea Ordin said Lozano's allegations were turned over to the FBI for preliminary investigation and a determination on whether the facts warrant further investigation. This is standard procedure in civil rights cases, she said.

In cases in which civil rights violations are proven, remedial measures may include civil action, criminal prosecution or a recommendation that the agency in question take steps to correct its own violations, Ordin said.

"Clearly, we are looking at the possibility of individual employees of INS having overstepped their bounds," Ordin said, "That's why one possibility would be for the agency itself to take remedial action."

The FBI confirmed they were looking into the matter, but would make no further comment.

During the Aug. 20 incident, Lozano said, an immigration officer placed his hand over Gomez' camera lense while he was trying to photograph the demonstration by the nuns. When Gomez pushed his hand away, three officers grabbed him and forced him toward a nearby agency van. They asked for identification and when Gomez offered his official press credentials, they asked that his citizenship and for documentation of his legal immigrant status, Lozano said. Gomez showed the officers his legal resident card, from which officers copied the serial number and, Lozano said "as a way of intimidation, they told him he was on limited status."

Lozano also described the second incident. While driving to work on Aug. 28, Gomez spotted several immigration agency vans involved in a sweep of illegal aliens in Glendale, and he stopped to take photographs. After he identified himself as a press photographer, he was again asked to produce his legal immigrant card. The officers unsuccessfully tried to take the film out of his camera and placed it in the van, but Gomez retrieved it.

Senator SIMPSON. There is a motion to table pending over on the Senate floor. It is about 10 minutes before that vote period will end. Before then I must go vote. Let us proceed now. I will be able to hear, I think, most of the next testimony. And then let us recess for 10 minutes so that I might personally hear the testimony of Ms. Cooper.

So, please proceed.

STATEMENT OF ARNOLDO S. TORRES, EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC)

Mr. TORRES. Let me just begin by reiterating what John has indicated. LULAC and Mr. Tony Bonilla, the national president, very much appreciate the fact that there is a great deal of flexibility in the approaches that are used by the subcommittee at your discretion as the Chair and that you have allowed the Hispanic organizations to come before you and testify.

More importantly, we appreciate the fact that you have had an extremely open door policy with us even though we do not always agree. We have had a great deal of openness on the perspectives that we both espouse. And we do recognize the genuineness of your concerns and certainly do not point the finger at you and say that your insistence on employer sanctions and ID is racially motivated.

I am Arnoldo Torres. I am the national executive director of LULAC, the League of United Latin American Citizens. Our testimony indicates the size and distribution of our membership in this country.

Basically, the opposition that we have to the employer sanctions program as proposed by the administration as well as in other legislative initiatives has been virtually covered by John insofar as the discrimination factors.

And the fact that with a declining budget and with an extremely and more importantly a declining emphasis on protecting the civil rights of people by this administration, we are concerned that regardless of how an employer sanctions program is designed and regardless of the concerns that you have continually indicated, there still will be a factor of discrimination involved. And how do we properly address that?

We feel that under the present scheme of things there is an extremely relaxing attitude toward antidiscrimination statutes, and consequently poor enforcement of these laws. In view of this, employer sanctions will have some severe problems.

The other point that we have heard throughout the day regards job displacement. However, if we look at Mr. Lawrence Fuchs' comments earlier today—and you have praised Mr. Fuchs for his background, and Senator DeConcini in fact said that he was the leading immigration expert—Mr. Fuchs argues that there is, in fact, no large-scale job displacement, that the crucial problem is the ill effects of a subsociety being created. Our question would then be. Will not sanctions increase this subsociety, making employment practices illegal and providing incentives to stay away from the legal channels?

In other words, Mr. Fuchs himself has indicated that there isn't a large displacement factor, but we have heard from the AFL-CIO earlier in the panel and we have heard from Mr. Jack Otero today that there is an extreme problem with displacement.

Second, we have heard from Ms. Meissner that there would be 75-percent compliance on good faith. I do not know what would lead anybody to believe that there is going to be good-faith compliance, because we have a number of labor laws on the books now and there does not appear to be an extreme high percentage of good-faith compliance there.

Furthermore, the concern has been developed throughout these hearings today that there is a high magnitude of displacement. We see, and we have heard Mr. Oswald from the AFL-CIO say, that 60 percent, over 60 percent, of undocumented workers earn more than the minimum wage.

Unfortunately, Mr. Oswald perhaps did not mean to, but he left out the important fact that this was one study of a targeted piece of work that did not reflect a nationwide assessment and certainly was not indicative of the overall situation in the country. And I am sure that if he were given the opportunity to clarify his statement, I am sure that he would, because those are the facts.

Let us look at the hirings, the reasons why American employers hire undocumented workers. Our contention is simply that for some reason or the other there is this obsession with cheap labor primarily of Latin American stock, good Latin American labor. But primarily, U.S. employers hire undocumented workers because they can and do violate U.S. labor laws.

In an article that appeared—and we included it in our testimony—in Time magazine of September 7, there is a quote that states, "In the restaurant business California State investigators have inspected 2,835 Los Angeles restaurants and found that 65 percent of them were breaking wage laws." That to us would indicate that they are also hiring undocumented workers. And I think that the article goes on to substantiate that.

There is a very direct correlation between the violation of labor laws and the hiring of undocumented workers, and this is why in the alternative approach we have taken solely to the employer sanction proposal, we advocate a very strong and vigorous enforcement of these labor laws.

Also, we would be very interested in, increasing the penalties associated with the number of violations that an employer has of the National Labor Relations Act and many of the laws Mr. Otero has previously mentioned.

I am going to leave the rest for later. I have the red light, and you have to go. I hope we can get into a good question-and-answer session. But thank you very much.

[The prepared statement of Mr. Torres follows:]

PREPARED STATEMENT OF ARNOLDO S. TORRES

GOOD AFTERNOON, MR. CHAIRMAN AND MEMBERS OF THE U.S. SENATE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY. MY NAME IS ARNOLDO S. TORRES, I AM THE NATIONAL EXECUTIVE DIRECTOR FOR THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC). LULAC IS THIS NATION'S OLDEST AND LARGEST HISPANIC CIVIL RIGHTS AND SERVICE ORGANIZATION WITH A MEMBERSHIP OF OVER 100,000 IN 44 STATES OF THE UNION.

SINCE THE INITIAL LEGISLATIVE DISCUSSIONS BEGINNING IN 1970 ON U.S. IMMIGRATION AND REFUGEE POLICY, LULAC HAS BEEN EXTREMELY CONCERNED WITH THE PHILOSOPHICAL DIRECTION BEING TAKEN IN CONGRESS AND SOCIETY IN GENERAL. WE HAVE OBSERVED, STUDIED, EXPERIENCED AND FELT THE EVER GROWING ANIMOSITY TOWARDS NEW IMMIGRANT FLOWS LEGAL AS WELL AS ILLEGAL. OVER THIS TIME WE HAVE WITNESSED THE INABILITY OF CONGRESS TO SERIOUSLY REFORM, AND IMPROVE THE OPERATIONS OF THE IMMIGRATION AND NATIONALITY ACT AND THE IMMIGRATION AND NATURALIZATION SERVICE (INS). DESPITE A FAVORABLE ENVIRONMENT AND AVAILABLE FINANCIAL RESOURCES TO INITIATE POSITIVE CHANGES IN THE IMMIGRATION SYSTEM WE FOUND A DECADE OF INEPTITUDE, CONFUSION, AND COMPLEXITIES WHICH HAVE BROUGHT US TO TODAY, TO THESE AND OTHER HEARINGS WHICH CONGRESS WILL BE CONDUCTING.

IN ADDITION, THE HISPANIC COMMUNITY FINDS ITSELF SINCE THE MID-1970'S TO THE PRESENT, IN A SOCIETY WHICH BLAMES US FOR EMPLOYMEN ECONOMIC STAGNATION AND MOST THREATENING ANTI-AMERICAN SENTIMENTS. WE FIND THAT THE GENERAL PUBLIC VIEWS THE FLOWS OF UNDOCUMENTED WORKERS, THE CUBAN REFUGEES, AS PRESENTING SERIOUS ECONOMIC AND SECURITY THREATS TO THIS COUNTRY. CONSEQUENTLY, WE OFTEN TIMES ARE MADE TO FEEL THAT WE ARE THE REASONS FOR THE PROBLEMS FACING THIS COUNTRY. ARTICLES, COMMENTARIES, THE MEDIA AND PUBLIC OFFICIALS OVERALL APPEAR TO HAVE CONSTRUCTED AN IMAGE OF UNDOCUMENTED WORKERS AS ATTILA OF THE HUN STREAMING ACROSS THE BORDERS OF THIS COUNTRY IN A CONSPIRACY TO RAPE, PILLAGE, PLUNDER AND DESTROY THE AMERICAN WAY OF LIFE. THIS IMAGE IS CONSTANTLY FED BY PUBLIC OFFICIALS CLAIMING THAT AMERICAN VALUES ARE THREATENED BY NON-ENGLISH SPEAKING PEOPLE. THIS HAS EVOLVED INTO THE ANTI-BICULTURAL/BILINGUALISM MENTALITY. NOT ONLY ARE THESE PUBLIC

OFFICIALS CONCERNED WITH THE NUMBER OF DOCUMENTED AND UNDOCUMENTED COMING TO THIS COUNTRY BUT NOW THEY ARE CONCERNED WITH THEIR CULTURAL AND LANGUAGE ORIGINS. UNFORTUNATELY, THIS IRRESPONSIBLE BEHAVIOR WHICH INCITES RACIAL SENTIMENTS HAS BEEN INCREASING AND MOST PROBABLY WILL CONTINUE TO DO SO.

THIS BRINGS US TO THE PRESENT CONCERN OF WHERE DO WE GO FROM HERE? THIS SUBCOMMITTEE IS FACED WITH A TREMENDOUS CHALLENGE OF HAVING TO REFORM THE IMMIGRATION AND REFUGEE POLICY OF THIS COUNTRY. IT MUST ATTEMPT TO EFFECTIVELY ADDRESS THE INS SYSTEM, LEGAL IMMIGRATION, ILLEGAL IMMIGRATION, NUMERICAL CEILINGS, REFUGEE QUOTAS AND MANY OTHER IMMIGRATION ASPECTS IN A COMPREHENSIVE MANNER. IT MUST TAKE THIS ACTION IN A SUBJECT MATTER WHICH IS HIGHLY CONTROVERSIAL, EMOTIONAL AND UNDEFINED, WITH A GREAT DEAL OF REALISM, SENSITIVITY AND COMPASSION. ALSO, IT MUST DEVISE EFFECTIVE PUBLIC POLICY, NOT ONE BASED ON POLITICAL EXPEDIENCY, WHICH WILL HAVE SHORT AND LONG TERM IMPACTS ON THE ISSUE OF EVER-INCREASING FLOWS OF DOCUMENTED AND UNDOCUMENTED PEOPLE.

THE MAJOR CONCERN IN THIS IMMIGRATION DEBATE IS THE ASSUMED UNCONTROLLABLE FLOW OF UNDOCUMENTED WORKERS TO THE UNITED STATES. DESPITE THE LACK OF ANY CONCRETE STATISTICS ON THEIR NUMBERS, THEIR IMPACT ON THE AMERICAN LABOR FORCE AND ON THE ECONOMY IN GENERAL, WE NONETHELESS ARE BEING PRESENTED WITH UNTESTED AND NON-SUBSTANTIATED CONCEPTS TO CURB THEIR FLOW AND IMPACT. ONE OF THESE CONCEPTS IS EMPLOYER SANCTIONS WHICH WOULD MAKE IT ILLEGAL FOR U.S. EMPLOYERS TO HIRE UNDOCUMENTED WORKERS. IT IS THE OPINION OF LULAC AND MANY OTHER HISPANIC ORGANIZATIONS WHO REPRESENT OUR COMMUNITY THAT EMPLOYER SANCTIONS WILL HAVE AN EXTREMELY ADVERSE SOCIAL, POLITICAL AND ECONOMIC IMPACT ON OUR PEOPLE. WHY? EARLIER WE STATED THAT MEDIA ACCOUNTS HAVE FOSTERED THE OPINION THAT THE UNDOCUMENTED WORKER IS PRIMARILY OF HISPANIC DESCENT. AS A RESULT THE PUBLIC INTERPRETATION IS THAT UNDOCUMENTED HISPANICS ARE RESPONSIBLE FOR JOB DISPLACEMENT OF AMERICAN WORKERS. CONSEQUENTLY, A SANCTIONS PROGRAM WOULD BE DIRECTED TOWARDS THE HISPANIC COMMUNITY AND WOULD SEVERELY THREATEN THE RIGHTS OF OUR COMMUNITY. THESE ADDITIONAL HARDSHIPS NEED NOT OCCUR FOR THERE IS

NO EVIDENCE, DATA OR COMPELLING REASON WHICH CAN LOGICALLY LEAD ANYONE TO BELIEVE THAT SUCH A PROPOSED CONCEPT WOULD IN EFFECT STOP THE FLOW OR EMPLOYMENT OF UNDOCUMENTED WORKERS. THERE SEEMS TO BE AN OBSESSION WITH THIS CONCEPT DESPITE NOT HAVING ANY SUPPORTIVE MATERIALS DISCUSSING ITS POTENTIAL EFFECTIVENESS.

REASONS FOR OPPOSITION

IT IS FOR THE FOLLOWING REASONS THAT LULAC STRONGLY OPPOSES THE ADMINISTRATION AND LEGISLATIVE INITIATIVES CONCERNING EMPLOYER SANCTIONS:

*AN EMPLOYER SANCTIONS PROGRAM WOULD BE OF THE MAGNITUDE OF THE EQUAL EMPLOYMENT OPPORTUNITY PROGRAM. PROBLEMS OF MONITORING HAVE CONSISTENTLY PLAGUED THIS PROGRAM. THESE WOULD BE THE SAME PROBLEMS CONFRONTING A SANCTIONS PROGRAM, HOWEVER COMPLEXITIES WOULD BE GREATER DUE TO HAVING MORE EMPLOYERS BEING COVERED AND EMPLOYER LIABILITY. THE PROGRAMS ENFORCEMENT UNDER ANY SCHEME AND ITS EFFECTIVENESS ARE HIGHLY QUESTIONABLE.

*SHOULD THERE BE A SANCTIONS PROGRAM, THE COSTS FOR ATTEMPTING TO ENFORCE IT, AND RESPOND TO DISCRIMINATION COMPLAINTS WOULD BE TREMENDOUS. COUPLE THESE COSTS WITH THE CREATION OF A NEW I.D. SYSTEM AND INITIAL COSTS COULD RISE TO $7 BILLION ANNUALLY. THESE COSTS WOULD BE INCURRED WITHOUT REASON TO ASSUME A MEASURE OF SUCCESS. THIS COULD HARDLY BE CONSIDERED A COST-EFFECTIVE PUBLIC EXPENDITURE.

*PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATIONS CANNOT BE BUILT INTO SUCH PROGRAM DUE TO ITS MAGNITUDE, AND BASED ON THE INABILITY OF ISTING ANTI-DISCRIMINATION PROGRAMS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE DEPARTMENT OF LABOR'S OFFICE OF FEDERAL CONTRACT COMPLIANCE (OFCCP) TO EFFECTIVELY RESPOND AND ADDRESS DISCRIMINATION COMPLAINT CASES. IN ADDITION, THESE PROGRAMS HAVE BEEN SIGNIFICANTLY AFFECTED BY BUDGET CUTS, RELAXING OF REGULATIONS AND REFORM OF STATUTES.

*WOULD INCREASE EMPLOYMENT DISCRIMINATION BY CREATING INCENTIVES AND OPPORTUNITIES FOR EMPLOYERS TO DISCRIMINATE. UNSCRUPULOUS

EMPLOYERS WHO PRESENTLY DISCRIMINATE WILL PERCEIVE THIS PROGRAM AS SOMEHOW LEGITIMIZING THIS PRACTICE. OTHER EMPLOYERS WILL OVER-STEP THEIR RESPONSIBILITY BY OVER-ZEALOUSLY ENFORCING STANDARDS FOR WORK AUTHORIZATION STATUS, THUS HAVING EMPLOYERS ACT IN A LAW ENFORCEMENT CAPACITY. THIS DEVELOPMENT SERIOUSLY CHALLENGES AMERICAN NOTIONS OF AUTHORITY AND DUE PROCESS.

*EMPLOYERS IN AN EFFORT TO AVOID LENGTHY RECORD KEEPING AND VERIFICATION OBLIGATIONS WILL "TAKE NO CHANCES" BY REFUSING TO HIRE FOREIGN-LOOKING PERSONS. IN ADDITION, EMPLOYERS WILL READILY CONSIDER THOSE JOB APPLICANTS WHOSE WORK AUTHORIZATION WILL NOT BE QUESTIONED OR DELAYED.

*DUE TO HIGH UNENFORCIBILITY FACTOR EMPLOYERS HAVE BUSINESS INCENTIVES FOR NON-COMPLIANCE. EMPLOYERS CONTROL IN HIRING COULD BE BASED ON ANTI-UNION CONCERNS. IN ADDITION, EMPLOYERS WILL BE FREE TO INITIALLY HIRE UNDOCUMENTED, PAY AND PROVIDE SUB-STANDARD WAGES AND CONDITIONS, AND STILL REPORT UNDOCUMENTED TO INS FOR DEPORTATION IF THEY ATTEMPT TO ORGANIZE.

*IN MANY CASES, EMPLOYER SANCTIONS WILL PLACE EMPLOYERS IN A MORE ADVANTAGEOUS POSITION TO EXPLOIT UNDOCUMENTED, AND DEPRESS WAGES AND WORKING CONDITIONS DUE TO THE LAW ENFORCEMENT POWERS EMPLOYERS WILL ACQUIRE WITH THIS PROGRAM.

*IN SOME CASES IT IS CONCEIVABLE THAT EMPLOYERS FOUND GUILTY OF KNOWINGLY HIRING UNDOCUMENTED WILL MERELY PASS THESE FINE COSTS TO THEIR WORKERS.

*THE INTRODUCTION OF THIS CONCEPT INTO THE FREE ENTERPRISE SYSTEM, SPECIFICALLY FOR EMPLOYERS, PRESENTS SIGNIFICANT QUESTIONS OF FEDERAL INTERVENTION. REGARDLESS OF MODEL USED, EMPLOYERS WOULD BE RESPONSIBLE FOR MAINTAINING PAPERWORK WHICH WOULD PRESENT ADDED BURDENS AND COSTS.

IN ADDITION TO THESE CONCERNS WE MUST ALSO QUESTION WHAT HAPPENS IF AN EMPLOYER DISCOVERS AN UNDOCUMENTED WORKER ATTEMPTING

TO SECURE EMPLOYMENT? WILL AN EMPLOYER THEN TAKE ON LAW ENFORCEMENT RESPONSIBILITIES? WILL HE APPREHEND AND DETAIN? WILL HE MERELY REPORT HIS DISCOVERY TO INS OR THE DEPARTMENT OF LABOR? ALSO, DESPITE THE REALITY THAT THE PRIMARY REASON FOR UNDOCUMENTED WORKER FLOWS IS TO SECURE EMPLOYMENT, HOW DO YOU DEAL WITH THOSE WHO COME FOR FAMILY RE-UNIFICATION AND OTHER UNKNOWN REASONS? WE HAVE OFTEN TIMES FELT THAT AS IT WAS AMERICA'S "MANIFEST DESTINY" TO GO WEST SO IS THE HISPANIC'S "MANIFEST DESTINY" TO GO NORTH. IN OTHER WORDS, THERE IS AN UNEXPLAINED FASCINATION AND DETERMINATION FOR PEOPLE SOUTH OF THE U.S. BORDER TO COME NORTH. WILL EMPLOYER SANCTIONS BE ABLE TO DEAL WITH THEM?

FURTHER, OTHER COUNTRIES OF THE WORLD HAVE EMPLOYER SANCTIONS PROGRAMS MUCH FOR THE SAME REASON FOR WHICH WE PROPOSE. HAVE THESE SYSTEMS BEEN STUDIED AND ANALYZED FOR THEIR EFFECTIVENESS? ARE WE WILLING TO HAVE THE TYPE OF RESTRICTIONIST/LAW ENFORCEMENT ENVIRONMENT IN OUR SOCIETY AS MANY OF THESE COUNTRIES HAVE? THESE ARE SOME OF THE ADDITIONAL ASPECTS WHICH MUST BE TAKEN INTO CONSIDERATION AND CLOSELY SCRUTINIZED IN DEBATING THE IMPLEMENTATION OF AN EMPLOYER SANCTIONS PROGRAM.

ALTERNATIVE

IT IS OUR CONTENTION THAT THERE ARE NO INCENTIVES FOR EMPLOYERS TO COMPLY WITH AN EMPLOYER SANCTIONS LAW. UNDER THE ADMINISTRATION'S PROPOSAL, A PROSPECTIVE EMPLOYEE MUST PRODUCE THE FOLLOWING PROOFS OF ELIGIBILITY TO WORK: "(A) DOCUMENTATION ISSUED BY THE INS, SUCH AS A PERMANENT RESIDENT ALIEN CARD OR TEMPORARY WORKER VISA; OR ANY TWO OF THE FOLLOWING: (B) BIRTH CERTIFICATE, (C) DRIVER'S LICENSE, (D) SOCIAL SECURITY CARD, AND (E) REGISTRATION CERTIFICATE ISSUED BY THE SELECTIVE SERVICE SYSTEM. IN ADDITION, THE NEW HIRE AND THE EMPLOYER WOULD SIGN A FORM CERTIFYING, RESPECTIVELY, THAT THE NEW HIRE IS ELIGIBLE TO WORK IN THE UNITED STATES, AND (II) THE EMPLOYER HAS EXAMINED THE IDENTIFIERS AND HAS NO REASON TO BELIEVE THE EMPLOYEE IS NOT ELIGIBLE TO WORK. THE FORM STATING THE CITIZEN OR ALIEN STATUS OF THE INDIVIDUAL AND THE DOCUMENTATION PRESENTED WOULD BE RETAINED BY THE EMPLOYER AND BE AVAILABLE FOR INSPECTION BY INS AND LABOR DEPARTMENT COMPLIANCE OFFICERS."

The above sources of identification are all readily counterfeitable and would certainly present no economic or legal threat to the unscrupulous employer. He could, and would, easily continue to hire undocumented workers while discriminating on the bases of questionable worker authorization status. The employer continues to exercise major discretionary powers in determining the legal status of a job applicant.

We believe that a more effective approach to curtailing the hiring of undocumented workers in U.S. jobs is the enforcement of existing labor and tax law. Studies, articles and a Task Force on the Employment of Undocumented Workers (EUW) of the Department of Labor's Employment Standards Administration clearly indicate that employers who violate U.S. labor laws also hire undocumented workers. (article attached) In other words, employers hire undocumented workers in order to violate laws by paying below minimum wage, and having substandard working conditions. They recognize that these workes will not report such practices for fear of being deported. This employer practice depresses wage and working standards for the American worker. We would propose the following?

Increase funding for enforcement of U.S. Labor Law

A. Labor laws to be enforced are:
   1. Minimum Wage
   2. Occupational Safety and Hazardous Act
   3. Fair Labor Standards Act
   4. Farm Labor Contractors Registration Act (FLCRA)
   5. Workmen's Compensation
   6. National Labor Relations Act
   7. Federal Unemployment Tax

   IRS Law

   1. Withholding Tax

B. Enforcement of these laws would be targeted to those employers and industries (primarily in secondary labor market) who have a pattern or practice of employing undocumented.

C. UNDERTAKE AN EMPLOYER SANCTIONS STUDY WHICH WOULD EXAMINE:

1. ASSESSMENT OF DISPLACEMENT:
    - A. MAGNITUDE OF DISPLACEMENT.
    - B. INDUSTRY DEPENDENCY ON UNDOCUMENTED
    - C. WHETHER BENEFITS OF EMPLOYER SANCTIONS ARE WORTH THE CIVIL RIGHT AND ECONOMIC REPERCUSSIONS.

THIS APPROACH WOULD BE LESS COSTLY, THREATENING, AND CUMBERSOME, WHILE BEING ENFORCEABLE, COST-EFFECTIVE, AND IMPROVE LABOR MARKET CONDITIONS. IT WOULD REENFORCE OUR SOCIETY'S DISDAIN FOR SUBSTANDARD WAGES AND WORKING CONDITIONS, WHILE RELYING UPON EXISTING AND ACCEPTED ADMINISTRATIVE AND ENFORCEMENT MACHINERY.

THE MAJOR REASON EMPLOYERS HIRE UNDOCUMENTED IS DUE TO THEIR ABILITY TO VIOLATE U.S. LABOR LAW. THE RESTAURANT, GARMENT AND AGRICULTURAL INDUSTRIES ARE THE PRIMARY EMPLOYERS OF UNDOCUMENTED WORKERS. THE DEPARTMENT OF LABOR HAS FOUND CONSISTENT AND FLAGRANT VIOLATIONS OF LABOR LAW IN THESE INDUSTRIES WHICH HAS MADE IT POSSIBLE TO HIRE UNDOCUMENTED WORKERS. OUR ALTERNATIVE WOULD FOCUS THE ENFORCEMENT OF THESE LAWS IN THESE INDUSTRIES AND ON THOSE EMPLOYERS KNOWN TO HAVE A "PATTERN OR PRACTICE" OF VIOLATIONS. THIS APPROACH WOULD NOT ONLY BEGIN TO CURTAIL THE EMPLOYMENT OF UNDOCUMENTED BY INSURING COMPLIANCE WITH THE LAW, BUT ALSO IMPROVE THE WORKING CONDITIONS OF THE AMERICAN WORKER WHILE NOT ALLOWING THE DEPRESSION OF U.S. WORKING CONDITIONS AND RETARDING OF WAGE AND LABOR MARKET ADVANCEMENTS.

WE HAVE ATTACHED PORTIONS OF THE EMPLOYER SANCTIONS RESEARCH STUDY CONDUCTED BY THE CENTER FOR THE STUDY OF HUMAN RIGHTS/NOTRE DAME UNIVERSITY LAW SCHOOL 1980, WHICH DISCUSS CHANGES IN LABOR LAW SO AS TO MORE EFFECTIVELY DISCOURAGE THE HIRING OF UNDOCUMENTED WORKERS.

U.S. LABOR LAW HAS BEEN POORLY ENFORCED IN THIS COUNTRY, A FACT WHICH HAS MADE IT EASY FOR THE HIRING OF UNDOCUMENTED. IF PROPERLY ENFORCED, THERE IS MORE OF AN INCENTIVE FOR AN EMPLOYER TO COMPLY WITH LABOR LAW THAN WITH ANY TYPE OF EMPLOYER SANCTIONS PROGRAM. THIS IS DUE TO THE LONG CASE HISTORY DEVELOPED, AS WELL AS TO THE FINANCIAL REPERCUSSIONS FACING EMPLOYERS. IN ADDITION, ENFORCEMENT MUST BE TARGETED TO THOSE INDUSTRIES PREVIOUSLY MENTIONED IN ORDER TO BE MORE COST-EFFECTIVE. OUR PROPOSAL IS IN ESSENCE AN EMPLOYER SANCTIONS PROGRAM.

WE WOULD LIKE TO EMPHASIZE THAT NO TYPE OF EMPLOYER SANCTIONS BY ITSELF CAN STOP THE FLOW OF UNDOCUMENTED WORKERS. WE BELIEVE THAT THE REASONS FOR THE PHENOMENA OF UNDOCUMENTED FLOWS TO THIS COUNTRY ARE MANY AND COMPLEX, TO RELY ON SUCH A PROGRAM. IT IS IMPERATIVE THAT WE RECOGNIZE THE PRIMARY REASONS FOR THESE FLOWS AS BEING ECONOMIC AND THAT ONLY WHEN WE HAVE DEVISED A PLAN WHICH HAS SHORT AND LONG TERM IMPACTS, AND EMPHASIZES ECONOMIC SOLUTIONS, WILL THE UNDOCUMENTED PHENOMENA BE PROPERLY ADDRESSED.

THROUGHOUT THIS DEBATE MANY WHO DISAGREE WITH OUR POSITION AS STATED, HAVE ALLUDED THAT THERE IS NO UNIFYING POSITION ON THIS ISSUE AND THAT OUR MAJOR INTEREST IS TO HAVE MORE HISPANICS ENTER THE U.S. WE RESPOND THAT THERE IS STRONG UNANIMITY IN OPPOSITION TO EMPLOYER SANCTIONS Y THE HISPANIC COMMUNITY AND THAT WE DO SUPPORT THE NEED TO BETTER CONTROL THE FLOW OF UNDOCUMENTED WORKERS TO THIS COUNTRY, HOWEVER, THE MEANS USED TO CURTAIL SHOULD NOT BE AT THE EXPENSE OF OUR COMMUNITY. WE DID NOT CREATE THIS PHENOMENA, WE DID NOT ENCOURAGE FOR FINANCIAL GAIN THE IMPORTATION OF CHEAP LABOR SO WE DO NOT WANT TO BE MADE THE SCAPEGOATS FOR HOW THE FLOW IS DEALT WITH. WE HAVE MUTUAL GOALS AND CONCERNS, HOWEVER WE APPEAR TO SERIOUSLY DIFFER AS TO THE BEST WAYS OF ATTAINING THEM. WE NONETHELESS LOOK FORWARD TO WORKING WITH YOU IN THIS EFFORT AND VERY MUCH APPRECIATE YOUR OPENNESS AND WILLINGNESS TO HAVE US INCLUDED.

THANK YOU.

[From the U.S. News & World Report, Sept. 7, 1981]

NOTES FROM THE UNDERGROUND—MILLIONS OF ILLEGAL WORKERS WILL NOT BE CELEBRATING LABOR DAY

(By Charles Alexander. Reported by Jay Branegan/Chicago and Jeff Melvoin/Los Angeles with other U.S. bureaus)

(The dressmakers' workroom is a small L-shaped area on the fourth floor of a dilapidated building in downtown Los Angeles. Tattered sheets drape the dirt-streaked windows. Seven seamstresses, ages 18 to 45 and all from Latin America, sit in a tight row, huddled over their humming machines, monitored by a stocky Hispanic woman with a shock of bright orange-red hair. On a nearby desk rests a broken time clock. The workers were not paid last week; they may not be paid this week. The boss will pay them when she has the money. Mañana. Perhaps tomorrow.)

For most Americans, Labor Day is a time to relax and reflect upon the hard-won rights gained by workers in decades past: the 40-hour week, paid vacations and sick leave, to name a few. But while millions pause next Monday to enjoy backyard barbecues or walks on the beach, a silent, almost invisible labor force will toil on without a break. In steamy sweatshops, scorched fields and cramped kitchens across the U.S., these underground workers will labor long hours for low pay under conditions that seem out of the pages of Charles Dickens.

The force that drives the underground workplace is the free flow of illegal immigrants across U.S. borders. Sometimes illiterate, always frightened, the aliens form a vast pool of easily exploitable labor. Century-old Manhattan lofts that are dangerous firetraps once a again house garment industry sweatshops where Chinese, Koreans and Cubans make as little as $60 a week for 70 hours of work—less than a third of the U.S. minimum wage of $3.35 an hour. Polish refugees have been found cleaning out oil-storage tanks in New Jersey for $2 an hour or less. At a small factory in Chicago, shifts of Mexicans working twelve-hour days keep two tortilla-making machines going around the clock. The din is deafening, and the heat from the ovens almost unbearable. Says one employee, a 25-year-old mother of two: "It's like hell."

Federal officials estimate that up to 6 million illegal aliens now reside in the U.S. Last year alone as many as 1.5 million unauthorized immigrants eluded American border patrols. This swelling reservoir of willing workers makes it easy for unscrupulous businessmen to flout U.S. labor laws. A Labor Department survey completed last year found that 5 percent of U.S. businesses paid less than the minimum wage, and 21 percent failed to give time and a half for overtime hours.

The exploitation of alien labor has also led to the mistreatment of American workers. Says Craig Berrington, a Labor Department official who oversees investigations of wage law violations: "We cannot identify any particular job where there is only abuse of illegal aliens. We see them working side by side, illegal immigrants and U.S. citizens."

Labor union leaders and many politicians charge that the uninvited foreigners have taken jobs away from Americans and flattened wages at the lower end of the economic ladder. Says Harold Washington, a black Congressman from Chicago: "The mere presence of a large number of illegal aliens is depressing wages generally, and forcing unskilled blacks to take dirtier, lower-paying jobs." In most industries that employ large numbers of menial workers, labor law violations can be found. Some of the worst offenders:

RESTAURANTS

Despite the often daunting price of dining out, restaurant busboys and dishwashers are among the most underpaid and overworked American laborers. In the past three years, California state investigators have inspected 2,835 Los Angeles restaurants and found that 65 percent of them were breaking wage laws.

A Labor Department survey of 305 Chicago-area restaurants revealed that 91 percent were underpaying their workers. Two restaurants in Miami Beach, Newport Pub and Roney Pub, were ordered by a federal judge this summer to pay $250,000 in back wages to more than 900 past and present employees. A part-owner of both restaurants is Walter Kaplan, the vice mayor of Miami Beach.

AGRIBUSINESS

From the cucumber patches of Maryland thorugh the orange groves of Florida to the tomato fields of California, thousands of farm workers live in squalid shacks with communal latrines and no running water. Fruit and vegetable growers assert that they pay the minimum wage, but the money is often funneled through labor contractors who actually hire the workers. In many cases, these so-called crew chiefs, who are usually immigrants themselves, deduct exorbitant amounts from worker salaries for food, rent and transportation.

A notorious employer of illegal farm laborers is Ukegawa Brothers Inc., a large tomato grower in northern San Diego County. Says Chris Hartmire, an assistant to the president of the United Farm Workers of America: "The Ukegawa workers are living on the ground, under trees, under shrubs, in makeshift huts. They're in a semi-slave situtation." The workers bathe in irrigation canals and often drink contaminated water.

GARMENT INDUSTRY

Throughout New York City, the center of American garment manufacturing, the kind of horrid sweatshop common in the early 1900s is flourishing anew. In Chinatown lofts, Queens garages and South Bronx storefronts, workers toil from dawn until well past dark sewing pants, shirts and blouses for as little as 8 cents apiece. The rooms are often dimly lit and poorly ventilated. In many cases, huge rolls of cloth block fire exits. The workers range from the young to the very old. In a raid on Chinatown sweatshops last spring, federal investigators found one 90-year-old woman, who was working for $1 an hour, and an eleven-year-old child.

The sweatshop operators are usually immigrants who have graduated from labor to management. The take work orders from dozens of Manhattan manufacturers. The companies deny any knowledge that their garments are sewn in sweatshops, but the prices they pay—as little as $2.10 for a dress—make it obvious that the clothes were not made under legal labor conditions.

The garment industry and its sweatshops have spread over the years beyond New York. In Los Angeles, inspectors have uncovered more than 2,000 illegal workplaces using Hispanic labor. So many garment shops have popped up in Miami that one industry executive calls it "the Chinatown of the South."

Though government officials have raided hundreds of sweatshops in recent months, they admit that they are losing the battle. Businessmen simply move from one location to another. Says California Labor Investigator Joe Razo: "We may go into the same loft building five or six times in a month and find new occupants every time." Illegal aliens rarely report their bosses for fear of being arrested and deported. Even if the sweatshop operator is caught, the penalty he receives—usually just an order to pay the back wages owed his workers—does not stop him from setting up a new operation.

California has taken the lead among states in fighting the labor abuse in the garment industry. An antisweatshop law that went into effect last month requires all locations where clothing is made to be registered. If a manufacturer is found to be contracting out work to an unregistered shop, the goods can be confiscated. Labor experts believe that this kind of legislation, and even harsher penalties, should exist in all states.

The Reagan Administration has begun to confront the problem of poor labor conditions. The President plans to ask Congress to grant temporary legal status to all aliens who entered the U.S. before 1980 and give them the chance to become permanent residents after ten years if they learn English and fulfill other requirements. The Administration argues that legal foreign workers would not be as reluctant to report labor abuses.

Reagan also proposes new federal fines for employers who knowingly hire illegal aliens: up to $1,000 for each undocumented worker. Says Labor Secretary Raymond Donovan: "It is our apathy, our lack of concern that has allowed such an evil and unconscionable system to exist." Donovan faces a tough job in breaking through that apathy and cracking down on America's underground labor market.

Senator SIMPSON. You know we will. Ms. Cooper, I will be back, and we will hear your testimony. We will have a 10-minute recess.

[Brief recess.]

Senator SIMPSON. Sorry, I was a little longer than expected which is usual.

Now, could we have the testimony of Ms. Cooper, please.

STATEMENT OF MAUDINE COOPER, VICE PRESIDENT FOR WASHINGTON OPERATIONS, NATIONAL URBAN LEAGUE

Ms. COOPER. Thank you, Senator. And good afternoon. I am Maudine Cooper, vice president for Washington Operations of the National Urban League.

As you probably know, we do have an affiliate structure of 118 local Urban League chapters in some 37 States. The league is very pleased to have been invited here to testify this afternoon. We are committed to enhancing the employment opportunities of minorities and the disadvantaged, and it is that commitment that prompts us to share our concerns with you on the very, very controversial issue of employer sanctions.

To discourage the employment of illegal aliens and curtail rising illegal immigration, the league supports the imposition of civil penalties on those employers who knowingly and willingly employ undocumented aliens.

Additionally, criminal penalties should be imposed upon those employers who knowingly engage in patterns and practices of employing undocumented aliens.

Employer sanctions should be implemented as one focal point in a total program aimed at eliminating illegal immigration, for we believe that equal opportunity for all Americans is indeed adversely affected by the massive numbers of illegal aliens employed in this country.

Ambiguous and inequitable immigration policies have been largely ineffective in curtailing the constant influx of illegals. Several hundred thousand illegal immigrants enter the United States annually, as you well know. The Census Bureau estimates that between 3.5 million and 6 million persons are now here illegally, and most of those are employed.

While illegal immigrants enter this country for a combination of economic and political reasons, it is a fact that illegal aliens, for the most part, come to this country for the purpose of seeking employment. Our primary concern stems from the fact that illegal aliens in large numbers do indeed find employment in the United States. The result is, we believe, an adverse impact on the American labor market, exemplified by displacement and exacerbated unemployment rates among legal residents seeking entry-level jobs.

It is our position that we must now realize that current immigration policies simply work to perpetuate a blatantly unfair situation. We would be the first to admit that the millions of illegal aliens who beat a path to America's doors in search of employment can be counted among the world's most hardworking and ambitious people. Yet, they alone are penalized for participation in a system that could not exist without the cooperation of American employers.

Amidst the general consensus that something should be done about the increasing pressure of undocumented workers on the labor market, we cannot ignore the key responsibility that employers have and must continue to have if the system is ever to be equitable. No one can deny that our concern about the impact of undocumented workers on the labor force is a real and practical one, for blacks and other minorities in this country continue to suffer disproportionately high unemployment rates. The black unemployment rate continues to double that of whites and now stands at 16.2 percent, compared to 6.1 percent for white Americans.

Recently, as you probably know, the black youth unemployment rate soared to over 50.7, and that is by the official count of the U.S. Department of Labor. There are 30 million American citizens living below the poverty level. When these realities are juxtaposed against the fact that millions of those employed in the United States are undocumented workers, we must wonder how much of the world's poor this Nation can absorb while its own poor become poorer.

There are arguments, of course, and you have heard many of them just now from the two other panelists, that the impact of undocumented aliens on the labor force is negligible because they are employed in unskilled positions that are unacceptable to U.S. citizens. But we reject this argument because it appears circular. Jobs held by undocumented workers are perceived as unattractive because of low wages and often substandard working conditions, but these circumstances are, in turn, perpetuated by the continued hiring of illegal aliens.

Without legal prohibitions, employers can easily prefer hiring undocumented workers for which even subminimum wages might be attractive. The same employer may feel safe in maintaining substandard working conditions since illegal aliens will not complain to officials for fear of deportation. As you know, those workers are often noncomplaining.

But we have a number of other concerns. We are sensitive to, and concerned about, the issues raised by those who fear that employer sanctions will encourage job discrimination. We are particularly concerned about the Reagan administration's employer sanctions proposal and the potential for employment discrimination that it presents.

We also fear that employers will use these certification provisions as a pretext for not hiring black and other low-income Americans who change jobs more often than most. If such an employer were sued for discrimination, he or she could easily defend by asserting that his rejection of a particular applicant was an honest attempt to comply with employer sanctions.

This last possibility is peculiarly troublesome in light of recent statements by Assistant Attorney General for Civil Rights William B. Reynolds relative to employment discrimination suits by the Department of Justice. As you know, Mr. Reynolds stated that the Justice Department will be very reluctant to bring class actions in employment discrimination cases.

Rather than overstay my time, I will just ask that the rest of my testimony be submitted for the record, and I will be available for questions.

[The prepared statement of Ms. Cooper follows:]

PREPARED STATEMENT OF MAUDINE R. COOPER

Good Morning, I am Maudine R. Cooper, Vice President for Washington Operations of the National Urban League (NUL). The NUL, founded in 1910, is a non-profit, community service organization committed to securing equal opportunities and the full participation of blacks, the poor and members of other minority groups in American life. The Urban League seeks to bring about changes in those governmental and social systems that produce disparities among groups of Americans.

Working through 118 affiliates in 37 states and the District of Columbia, four Regional Offices and the Office of Washington Operations, the League has a multi-racial staff of more than 3,000 individuals who are trained in organizational management as well as the social and behavioral sciences. The Urban League movement is reinforced by a cadre of more than 32,000 volunteers.

Position on Employer Sanctions

The League is committed to enhancing the employment opportunities of minorities and the disadvantaged. It is that commitment which prompts us to share our concerns with you on the controversial issue of employer sanctions. To discourage the employment of illegal aliens and curtail rising illegal immigration, the National Urban League supports the imposition of civil penalties on those employers who knowingly and willingly employ undocumented aliens. Additionally, criminal penalties should be imposed upon those employers knowingly engaging in patterns and practices of employing undocumented aliens. Employer sanctions should be implemented as one focul point in a total program aimed at eliminating illegal immigration. For we believe that equal opportunity for all Americans is indeed adversely affected by the massive numbers of illegal aliens employed in this country.

Ambiguous and inequitable immigration policies have been largely ineffective in curtailing the constant influx of illegal aliens. Several hundred thousand illegal immigrants enter the United States annually and the Census Bureau estimates that between 3.5 and 6 million persons are now here illegally, most of whom are employed. While legal immigrants enter this country for a combination of economic and political reasons, it is a fact that illegal aliens, for the most part, come to this country for the purpose of seeking employment. Our primary concern stems from the fact that illegal aliens in large numbers do indeed find employment in the U.S. The result is an adverse impact on the American labor market exemplified by displacement and exacerbated unemployment rates among legal residents seeking entry level jobs.

It is our position that we must now realize that current immigration policies simply work to perpetuate a blatantly unfair situation. We would be the first to admit that the millions of illegal aliens who beat a path to America in search of employment can be counted among the world's most hard-working and ambitious people. Yet they alone are penalized for participation in a system that could not exist without the cooperation of American employers. Amidst the general consensus that something should be done about the increasing pressure of undocumented workers on the labor market, we cannot ignore the key responsibility that employers have and, must, continue to have, if the system is ever to be equitable.

Labor Market Impact of Undocumented Workers

No one can deny that our concern about the impact of undocumented workers on the labor force is a real and practical one; for blacks and other minorities in this country continue to suffer disproportionately high unemployment rates. The black unemployment rate continues to double that of whites and now stands at 16.2 percent compared to 6.1 percent for whites. Recently the black youth unemployment rate soared to over 50.7 percent. There are 30 million American citizens living below the poverty level. When these realities are juxtaposed against the fact that millions of those employed in the United States are undocumented workers, we must wonder how much of the world's poor this nation can absorb while its own poor become poorer.

There are arguments, of course, that the impact of undocumented aliens on the labor force is negligible because they are employed in unskilled positions that are unacceptable to U.S. citizens. But we reject this argument for two reasons. First of all because it appears circular. Jobs held by undocumented workers are perceived as unattractive because of low wages and substandard working conditions. But these circumstances are in turn perpetuated by the continued hiring of illegal aliens. Without legal prohibitions, employers can easily prefer hiring undocumented workers for which even subminimum wages might be attractive. The same employer may feel safe in maintaining substandard working conditions since illegal aliens will not complain to officials for fear of deportation.

Illegal aliens are often non-complaining victims of a situation which may be bad by American standards but would be worse at home. Critical to this point is the impact of such salary levels and workplace conditions on U.S. employees, working side by side with undocumented aliens. Those Americans, especially if they are of the same ethnic group as the undocumented worker, may be subject to the same exploitative practices or some vestiges of those practices if they complain.

Secondly, there is some doubt as to whether jobs held by undocumented workers are as unattractive to American workers as some would lead us to believe. Indeed, the Select Committee on Immigration and Refugee Policy reported in March 1981 that "a majority of studies indicate that undocumented/illegal aliens generally earn at or above the minimum wage." *

As stated by U.S. Supreme Court Justice William J. Brennan, Jr. in a case upholding a California law prohibiting the hiring of illegal aliens:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance of illegal aliens of jobs and substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens, and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. **

The National Urban League therefore believes that a straightforward and practical legislative program should be implemented for the purpose of eliminating the problem at its source. And we submit that in order to have any significant impact on illegal immigration, employer sanctions must be a major part of that program.

Major Concerns

We are sensitive to, and concerned about, the issues raised by those who fear that employer sanctions will encourage job discrimination. Many allege that when faced with possible civil and criminal penalties, employers are apt to summarily reject prospective employees who resemble illegal aliens without actually documenting the status of the applicants. This would clearly be as offensive to the League as to opponents of employer sanctions.

We are particularly concerned about the Reagan Administration's employer sanctions proposal and the potential for employment discrimination that it presents. For example, the Reagan proposal requires that an employer certify that he has examined two existing documents for the purpose of verifying legal residence and that he attest to the fact that he has no reason to believe the applicant is an illegal alien. This proposal in reality gives employers an easy out when challenged on discrimination charges.

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* U.S. Immigration Policy and the National Interst, Select Committee on Immigration and Refugee Policy, March, 1981, p.37

** DeCanas v. Bica 424 U.S.351(1976)

We fear that employers will use these certification provisions as a pretext for not hiring black and other low-income Americans who change jobs more often than most. If such an employer were sued for discrimination, he could easily defend by asserting that his rejection of a particular applicant was an honest attempt to comply with employer sanctions laws.

This last possibility is peculiarly troublesome in light of recent statements by the Assistant Attorney General for Civil Rights, William B. Reynolds, relative to employment discrimination suits by the Department of Justice. Mr. Reynolds stated that the Justice Department will be very reluctant to bring class actions in employment discrimination cases and that the Department would pursue remedies only for individuals who prove they intentionally have been injured. Mr. Reynold's statement means that, in effect, the EEOC, Justice, and other agencies will have to bring more individual cases.

The League is also aware of the fact that there are enforcement problems in employer sanction laws that already exist. The Farm Labor Contractor Registration Act (FLCRA), which prohibits farm labor contractors from knowingly recruiting or employing illegal aliens, has been law since 1974. In addition, 12 states now have employer sanction laws. These laws, however, have not been properly enforced and we would urge that that experience not be repeated where Federal sanctions are concerned.

CONCLUSION

In light of these concerns, the NUL believes that while employer sanctions should be the focal point in our overall strategy against the hiring of undocumented workers, a sanctions program must be coupled with targeted enforcement in the most abusive industries and against the most offensive employers. Emphasis should be placed on the garment industry, the agricultural industry, and the restaurant industry in particular, since it is commonly known that much of the abuse occurs there.

Further, other labor laws, such as the Fair Labor Standards Act, the Farm Labor Contractor Registration Act and minimum wage laws must be enforced with equal severity and targeted emphasis in the most abusive industries. In conjunction, it is important to note that employer sanctions cannot be effectively implemented while the Department of Labor is reducing its strike force for the enforcement of existing labor laws. There must be full cooperation in enforcing existing laws as well as newly implemented employer sanctions.

Finally, we must point out that it is time to begin to investigate effective and equitable means of enforcement. We need to explore possibilities for some kind of identity mechanism that will allow employers to effectively comply with new immigration laws while, at the same time, protecting civil liberties.

RECOMMENDATIONS

In addition to the above the NUL makes the following recommendations toward establishing a stronger immigration policy:

- A total reassessment of U.S. immigration policy
- Examination of INS practices which inhibit the effective execution of immigration policies
- Determination of means of correcting those practices which are inhibiting the role of INS in addressing the problems of undocumented aliens.
- Allocation of the necessary resources to effectively carry out INS purposes
- Enforcement of related laws, i.e., tax, labor laws, health and safety regulations
- Tighter border security
- Establishment of institutional federal, state and local cooperative mechanisms
- Application of maximum criminal penalties upon those engaged in such activities as the smuggling of undocumented aliens, forgery of documents used by such undocumented aliens, etc.
- Training programs for personnel within INS, especially its district offices
- Examination of the potential establishment of a universal I.D. system
- Massive assistance in economic development within the source countries for the benefit of that country's residents
- Special responsibility to monitor and evaluate the application of any alien legislation, as well as a role in determining whether there is an even handed application of present INS enforcement procedures.

Senator SIMPSON. Thank you very much.

I will ask some of these questions specifically and some generally for a varied response.

I would ask, of course, those who oppose employer sanctions, Mr. Torres and Mr. Huerta, what measures would you suggest to the subcommittee for the control of illegal immigration if you do not favor the employer sanctions method? I hope you will not simply say that the existing laws or the existing labor laws of the United States, if enforced, would be sufficient.

Mr. TORRES. I will respond, and I think maybe John may want to add something. Our position has never once been that we solely want the enforcement of labor laws to curtail the flow of undocumented workers into the country.

Our alternative in this regard simply was to respond to just the employer sanctions discussion. We have developed a proposal which emphasizes enforcement of INA by the Border Patrol but with specific concerns and provisions which not only discuss the increasing or the reestablishing of positions within the Border Patrol, but more importantly to address the entry and exit procedures under the INA, to increase the manpower to deal with the backlogs that are involved with INS, to provide a strong mechanism to address the continued and fairly well-established record of abuses by INS Border Patrol and field investigators of undocumented as well as American citizens.

Second, to certainly play with the numbers a little bit more to try to give some preference to those countries that have much more of a push factor than others.

But more importantly, we try to emphasize in the preliminary proposal immediate economic solutions to what we view as an economic problem. We are glad to say—that one of the few things we are in agreement with the administration on—is its recent acceptance of the free border trade zones between Mexico and the United States. It is going to be a part of its overall international assistance policy package.

We feel that this concept will be extremely beneficial in dealing with the economic problems of Mexico as well as extending some of these economic approaches to other sending countries.

The other perspectives that we include in our proposal would be to target the enforcement across areas that we know have a high influx of crossings. We would also emphasize the need to not have a guest worker program but more importantly, do analyze the potential assessments or lack of labor, I mean actually assess the labor shortages in the country and try to create a nationwide system that would relocate American workers in these jobs.

So, basically, the foundation of our approach is one of economics, and we feel that if you couple all of these things together with the enforcement of the U.S. labor laws, that does make for a very comprehensive and complete approach to dealing with the immigration problem which LULAC and the Hispanic community in general wants to very much see under more control than we see right now.

The major differences that we have have always been on the approaches, but that is the approach we have taken so far as the alternatives.

Mr. HUERTA. If I could add just one comment, and that is that MALDEF would support the statements of LULAC, and I think it is important to understand that MALDEF and many of the major organizations in the Latino community are not in favor of an open border. We think that the INS has been underfunded in both its service and enforcement functions and would support additional appropriations in both those areas.

I think that is important to get across. The administration claims to be adding more resources to INS when in fact they are cutting them back. They are cutting out, I think it was, 1,350 positions from fiscal year 1981 and 1982, and then they restore something like 564 in their package that they were asking. That is, again, more symbolism than substance in terms of INS enforcement.

Senator SIMPSON. That indeed was a tough one, and I was involved in watching that happen. We were able to restore some, but not enough, to the INS.

Mr. HUERTA. What is the current position level for INS? Would you know that?

Senator SIMPSON. Do you want to know the funding level also?

Mr. HUERTA. Funding level and positions.

Senator SIMPSON. The most recent administration proposal for fiscal 1982 is for 10,095 INS positions and $471 million.

How would discrimination result if an employer had a secure way of determining whether an applicant was authorized to work in the United States? He certainly could not convincingly say that fear of sanctions was a reason for not hiring anyone. How could the discrimination result if there were a secure way for every applicant for work to show that he was authorized to work in the United States?

Mr. TORRES. In that question, we would simply ask of you to clarify a couple of points. Simply, would an employer ask every potential or prospective employee, "Are you authorized to work?" Or would there be some kind of identification with that?

Senator SIMPSON. There would be a form of identification with that.

Mr. TORRES. Would the prospective employee———

Senator SIMPSON. That is what we envision.

Mr. TORRES. Would the prospective employer have to write a number or something documenting the fact that he has asked everyone regardless of height, persuasion, or whatever, and document a number?

Senator SIMPSON. This would be part of the procedure. The employer would be asked to affirm that he required each prospective employee to show if they were authorized to work in the United States. And if he does not affirm this or it is proven that his affirmation is false, then he will be subject to a penalty.

Mr. TORRES. Let me respond first, and then I know John wants to also.

You get into your protection loss here simply with how are you going to insure that everyone complying with this provision. Is there going to be a mandated time period in which all of these things, all of this reporting system is going to have to be submitted? Are people in Minnesota, employers in Minnesota, going to be asking the same questions that, say, someone in the Southwest is going to be asking?

These are some of the fears that we have, and the result of those fears, would obviously result in discrimination of, in our opinion, primarily Hispanic citizens or supposedly Hispanic lookalikes.

The concern also that we have is enforceability. How do you enforce a program of that magnitude when you have a program of affirmative action, equal employment opportunity now, and you have a certain criteria of employers who are going to be covered under that law, and you have a tremendous problem now of enforcing that law now?

And you would add additional complexities to any kind of tamperproof ID card simply by not being able to enforce it. And I do not know of any scheme that has been developed or that has been proposed or has been discussed and has been substantiated and supported by any data that would indicate to us that there is going to be a minimal risk.

And I think that we have enough discrimination now under the current system to not want to take any chances on the introduction of a program of that nature.

Senator SIMPSON. I understand those things. But I want to again emphasize that whatever we will be doing here and whatever we come out with after the long hearings and the presentation of the legislation, whatever we do, it will be a uniform requirement upon the employer, regardless of who is standing in front of him, regardless of that person's color, regardless of that person's height or speech or command of English or lack thereof.

The verification system whatever it is will be uniformly applied to everyone. And, of course, it must be something that is not an onerous burden on the employer.

I ask how could that discrimination result under those, under what we would say would be ideal conditions? You will be watching the development of the legislation as closely as we will be producing it. And I understand your fears, I really do. Certainly, the Hispanics have the most to lose from employer sanctions. I have said say that to you personally and privately, and I do not do it to be dramatic, but just because it is true.

Then how does that discrimination persist if the verification or the identification is uniformly required of everyone standing in front of the employer?

Mr. HUERTA. May I respond to that, Senator? Part of the problem is that we are dealing with ideas in the abstract somewhat. If we had some specific legislation that we could direct comments to, it might be more helpful to you.

One of the problems is engendered by the fact that the administration proposal talks about a $500 fine for hiring illegal aliens. What happens, in our mind, to the employer that says, "Well, I am not going to hire any, and just to make sure I do not run a risk of that, I am not going to be hiring anybody who may appear to be foreign"? That is a lot of the fear that we have.

I think when you have a specific proposal that we can look at in terms of the language in the uniform coverage and talking about fining employers across the board who do not provide that data, then you may find there is more flexibility in our position and more of a willingness to talk closer about the prospect.

Senator SIMPSON. In your testimony you refer to the "ever-growing animosity toward new immigrant flows, legal as well as illegal." I think that we are all aware of that. Do you or do you not think that a good part of that animosity toward legal immigration is due to the illegal flow, to the fact that the United States does not have adequate control over immigration?

Mr. TORRES. There is absolutely no doubt that the illegal flows have contributed to that mentality. But I do not think that it is solely just the illegal flows. We agree with you and others who wish to better control the illegal flows.

The reservations that we have are simply we—the Hispanic community—have not abetted the flows of undocumented workers to this country, we have not been in control to develop mechanisms to increase the flows of undocumented workers. It has been society, in general.

And perhaps the best example is the State of Texas that once had a State statute that allowed the bringing in of undocumented workers and they did not let any other State take them away. And they had a State statute.

But the point I am trying to make here, Senator, is simply that there is no doubt that we want to control the flow of undocumented workers, but we do not believe that the approaches in dealing with that control concern should be levied primarily on our backs, that we should have to suffer the consequences of a development that has taken many, many decades to get to where it is at now.

Second of all, we do not feel that certain comments by public officials, as I indicate in our testimony, help to bring the proper education to this issue. The hyperboles that are used by the press to describe "Mexican hordes crossing the border, night invasions," you know, it would appear that there it is a conspiracy by Mexicans to rape, pillage, and plunder American women in the Southwest. And it is this kind of coverage that hurts and really misconstrues the realities.

And I do not know what we can do about that, except to somehow play with the first amendment one of these days with the press. I do not know. But I think also you have to get into a situation where public officials deal with the issue in a more educational manner and are much more objective.

But I think that we very much would like to control the flows of undocumented workers. I just do not think that we are in agreement on the approaches.

Senator SIMPSON. I think that is very interesting, your comments there, because you and I have talked about that type of high drama and hyperbole. And I remember the response of your organization at the time of the first discussion of those issues which seemed to have a smattering of that.

Mr. TORRES. Well, we slip every now and then, Senator.

Senator SIMPSON. Well, I do, too. But what you say is so true. You and your organization have beautifully dulled that type of commentary in your dealings with us, leaving out the high drama. It certainly would be well for those in an adversary position, if that is the correct term, or at least on the opposing side, to do that same thing.

I hope we can pull the teeth of the emotional excesses in this one and try to get to something that would represent real progress in our immigration and refugee policy.

And we will avoid the racist policies which have sometimes existed in the past. Fairness will characterize the final product of this session or sessions to come—fairness to the American people, above all, but also fairness to those abroad who wish to join us.

Arnold Torres and I have these visits in the office as well as in public. I do have some questions for Ms. Cooper and Mr. Otero. I will just extend this a bit.

I was very interested in the testimony this morning from Stephanie Bower of the United Farm Workers. She said that her union represents Hispanic persons and that those Hispanic persons were concerned. But she also testified for the union in favor of employer sanctions.

I am wondering is there a difference in perspective and views between MALDEF and LULAC and the field workers or the organizational elements of labor in the field, the United Farm Workers or Caesar Chavez? Why is that?

Mr. HUERTA. I do not think there is a fundamental difference in what we are trying to accomplish. The more urban Latino organizations are concerned about discrimination that would be engendered in areas other than in the farmworker area. I do not believe that there will be discrimination against Latinos with an employer sanctions provision in the agricultural fields. I mean they care about how quickly you can pick their fruit, and that is about as far as it goes.

But in other areas where we encounter discrimination, it is more in the middle-class positions in the large economic enterprises of this country that are in the urban areas. And it is those areas that we are concerned about being discriminated against, and I think that would account for the difference in our testimony.

In terms of the interests they are speaking to, I can understand what they are trying to accomplish.

Mr. TORRES. Let me just add to that, Senator, that the UFW and Mr. Otero have the primary interest at heart of protecting their workers, the members of their union. And certainly, an employer sanctions program would go far in attempting to do that.

But the major factor here is simply that, as Mr. Bower from the UFW indicated in her testimony, that we are concerned with the fact that they bring undocumenteds into the country to break strike potentials. In other words, they are in the process of striking, they are in the process of negotiating, and the agricultural employers bring in undocumented workers to break their strike.

Now, that would be addressed to some extent, the UFW contends, if you had an employer sanctions program and you had the ability then to organize.

So I would think that in that regard that is one of the major concerns that at least Ms. Bower raised in her testimony, I think, orally as well as written, in her written testimony.

So I think that that is perhaps the only major difference that we have. We certainly are concerned about the things that the union representatives indicate, but I think that the interest in that regard is much more specialized insofar as the impact it has on unionization.

Senator SIMPSON. Knowing you, Jack, I am sure you will want to respond to that.

Mr. OTERO. First of all, I would like to ask Mr. Torres——

Senator SIMPSON. Now, you have to direct your questions to me, please.

Mr. OTERO. The characterization of my interest as representing only the economic interests of my members could not be farther from the truth. It is true, indeed, I represent hundreds of thousands of people who are of Hispanic descent, who work in many occupations in the United States. But my testimony here today is not strictly a labor interest. I am representing labor people, organized by a union, indeed, of which I am very proud.

But as a proud American citizen who emigrated to this country from Cuba, I am testifying before this committee because I am concerned that continued illegal immigration to this Nation will greatly undermine our society, it will make it impossible for many other people throughout the world who want to legally emigrate to this country, and also because I am concerned that it is deteriorating the fabric of this Nation in pitting one nationality against another, one class of people against another.

Today we face, as was obvious in the testimony of Ms. Cooper, the racial overtones of the problem that we face. Many blacks in this country, as she testified, feel threatened by the continued entry of people into this country who come to undermine working conditions, working standards, and social standards. So it is a very complex issue that requires immediate solutions.

Let me say to you that I speak for a lot of Hispanics—and I would like to underscore another point, Mr. Chairman: There are many Hispanic organizations in this country of all persuasions, and the term "Hispanic" sometimes is misunderstood. You know, we are not only Mexican or Cuban, we are Mexican, Cuban, Puerto Rican, Domincan, Argentinian, a myriad of different ethnicities within the same classical description of Hispanics. And you have to analyze the problem not only from the standpoint of one segment of the Hispanic community but how it applies to everybody.

For example, there is a misconception in this country that the undocumented workers are primarily and solely Mexican. That could not be farther from the truth. The INS testified before our Commission that more than 50 percent of those in this country who are illegal have entered legally. They are Greeks, they are Yugoslavs, they are Italians and all different nationalities who overstay their welcome and become illegal.

So we have to look into the problem of correcting the problem at the source: that the employer is penalized when he wilfully violates the statute and the various other laws by hiring illegal aliens for the purposes of undermining the law and exploiting people. And that is what this hearing is all about.

I hope, Mr. Chairman, that you will continue as determined as you are to see that not only employer sanctions are put into effect but also a meaningful employee identification program, which I submit to you can be very simply accomplished by just turning the current social security card into a document that cannot be forged, a document that the employer must check; no different than the employer has to do today.

When you apply for a job, the employer verifies in the W-4 form what is your social security number, the same requirement the employer has to follow in reporting to Uncle Sam and the Internal Revenue Service for the purpose of deducting your taxes.

All we are suggesting is that the employer ask for the verification of that number. And that can be very easily achieved by having a data bank at the Department of Labor with the pertinent information of the person to whom that number was issued in the first place. And that would cause no discrimination whatsoever.

Mr. TORRES. Senator, not wanting to have the last word but just wanting to clarify a couple of points.

Senator SIMPSON. If you could.

Mr. TORRES. Yes, I just want to clarify a couple of points. I am here representing LULAC, not personal travels or personal discussions that I have had. LULAC, with 100,000 members, has passed in the last 2½ years resolutions, at our national conventions, and executive board of directors, meetings, opposing employer sanctions.

Also, our records of membership indicate that we are not solely a Mexican American group, that we have chapters in 44 States, including many in the Southeast as well as the Northeast.

Second of all, the concern about displacement in the black community by undocumented workers, all the information that I am sure you have finds that the primary emphasis and location of undocumented workers is in the Southwest. Let us look at the Southwest labor market, as Vernon Briggs has done in his study. You have an extremely high unemployment rate—I mean, excuse me, very low unemployment rate, but you have an extremely low wage structure and you have an extremely high poverty rate. And that is primarily due to the fact that labor laws are not enforced in the Southwest and that there is no unionization.

So if anybody is going to suffer from a displacement factor, if we are going to assume it is extremely rampant, then the Hispanic community does have something involved. Our differences simply lie in the fact that we are concerned that the employer sanctions program will present more additional complexities to a situation where we do not think it is necessary.

Senator SIMPSON. I understand that. And, of course, the issue to the American public, in general—these are the 230 million who are already here, white, brown, black, and yellow—is that it is not right that an American has to compete with a foreign worker for a U.S. job. That is what they are saying, and that is very hearable. And I guess we will see whether we succeed.

I should ask you—I would ask for just a swift "Yes" or "No"—if you believed that a particular employer sanctions program would not result in discrimination—and you see that as we go through the hearing and the debate process—that it would not result in discrimination against Hispanic U.S. citizens and lawful permanent residents, would you then be supportive of such a system?

Mr. **Huerta**. I would still have some civil liberties concerns, but I would have to consult with Vilma Martinez, who is my boss, who is president and general counsel.

Senator **Simpson**. She is a very able spokeswoman. We have shared the podium at various places.

Now a question of Ms. Cooper. Your testimony is very precise on the issue of the presence of illegal aliens in U.S. cities as a contributor to greater unemployment and less favorable wages and working conditions for black Americans. Is that more prevalent in certain areas of the United States than in others?

Ms. **Cooper**. Well, if you follow the logic of some of my Hispanic brethren here, most of the studies have concentrated on the Southwest, for whatever reasons.

However, I think it was last year we testified on the whole issue of the Carter proposal in reference to refugee policies. We found that very little had been done in reference to those who had overstayed their visa, in reference to those who just simply walked across the Canadian border and decided to stay here or those who came through other mechanisms.

So, initially, our first reaction was that even in those research documents that are relied upon so heavily, there was, in our mind, some degree of racism as we approached the whole issue. We do not know how many others there are in Minnesota and North and South Dakota, Seattle, Washington, or Washington State.

My feeling is that if we were to do the same kind of exhaustive studies that we have done in the Southwest, we would indeed find that we have these kinds of problems in many of the States. New York State for example—my feeling is that it is not just the Southwest, to give you a short answer to your question—it is in many of our States.

Senator **Simpson**. I know that we have received some very interesting letters from the blacks in Florida, very intense. And then, of course, into that picture comes the possibilities of discrimination, more discrimination against the Haitians than against the Cubans. It is indeed a volatile, complex thing.

We certainly are receiving enough information that the black community, a majority of the black community, is deeply concerned and really feel very threatened by it all.

Ms. **Cooper**. I think if you look at our affiliate in New Orleans, that would crop up in the community unrest, if you will, when the Asian Americans settled there. That gives us reason for now beginning to speak out on the issue, recognizing that the local affiliates, the Miami Urban League, the New Orleans Urban League, and others, are facing this problem head on.

So we now have to become much more active as you develop the legislative proposal in making sure that our concerns are addressed.

Senator **Simpson**. I have found very few inactive groups on this issue.

Thank you very much. Your testimony is appreciated, and you all are excellent spokesmen for your positions. And I thank you. I apologize again for having skipped out. Thank you.

We will go now to a panel of scholars: Prof. Vernon Briggs of Cornell University; Prof. Mark Miller of the University of Delaware; Mr. David North, New TransCentury Foundation director; and Mr. Douglas Parker, Institute for Public Representation.

It is nice to see you, gentlemen. Shall we proceed with Professor Briggs? Why don't we do that in that order?

STATEMENT OF VERNON BRIGGS, PROFESSOR, CORNELL UNIVERSITY

Mr. Briggs. Thank you, Senator. I am just going to skim this testimony.

Senator Simpson. This is rigged to an electrode in your chair.

Mr. Briggs. It is my understanding that you are interested primarily in the employer sanctions at this hearing, and I just want to make it clear that I support employer sanctions but only as part of a comprehensive immigration reform package.

Employer sanctions alone is not going to stop the problem of illegal immigration or have much impact on it. But in my view, it is the crucial element of any type of immigration reform package, that without it nothing else makes sense. It is the linchpin, as I say in my testimony. It is what holds the whole package together. A linchpin does not look like very much in a machine, but the linchpin is crucial to the element of the whole program operating. And that is the way I see employer sanctions.

In my view, it sets the moral tone for what the reform measures seek to do; that is, they try to set the tone that it is an illegal act for an employer to hire an illegal alien. And in that sense, I support very strongly this concept.

I see it similar to the issue with the antidiscrimination efforts of the past decade; that is, antidiscrimination laws have not made it particularly easy to stop individual acts of discrimination, but they have set the moral tone.

In that sense, because they set the moral tone and because the penalties are at least plausible, there has been some voluntary compliance with the law. Employment patterns have changed markedly in the past 20 years from what they were before those laws were in place. I see the same thing occuring here. Employer sanctions are designed to set the moral tone and they will achieve some element of voluntary compliance if the associated penalties are plausible for those who abuse them.

I also believe that the potential effectiveness of employer sanctions hinges on the issue of identification. There must be some form of identification or otherwise employer sanctions makes no sense. So I strongly support the concept of either the use of the social security card—not the one currently in use but a counterfeit-proof card or some other type of work permit system. I outline some of the alternatives in my testimony, citing the work of David North extensively, who has looked into various means of doing this.

But I think you must have a system of univeral identification because, without it, you do have the possibility of discrimination. I believe that the issue of discrimination is much less of an issue to be concerned with when employer sanctions are tied to a universal identification system. Then you do not have to worry much about the idea that any particular group of people will be discriminated against because of their race or language or something else along this line.

Although I am grateful that the Reagan administration has at least recognized that immigration is an issue that needs reform, the package they have proposed grossly underestimates the importance of this issue by not coupling employer sanctions proposals with the identification question.

In my view, there is not much sense in going through with the employer sanctions if you are not going to have some kind of credible identification system linked with it. The proposals put forth in the July 30 package that I saw coming from the administration would not be satisfactory. All of the indicated identification items are clearly counterfeitable and are available in every border town and every major city in this country. Such items will not suffice as appropriate forms of identification.

I also think that there should be sufficient penalties against employers in terms of financial penalties.

I am also concerned about the word "knowingly" in the employer sanctions provisions. I think that is a weasel word. I think we should make it very emphatic: people who hire illegal immigrants have violated the law. Whether you know it or not, you have violated the law and you are subject to the penalties.

We do not ask people in terms of the Fair Labor Standards Act whether they knew the law or not. If they do not pay the minimum wage or if they do not meet occupational safety provisions, whatever the law might be, they have violated the law. And I think that is the same way here. The law ought to be emphatic. I think this is the only way that the legal system is ever going to take this topic seriously.

My greatest concern with employer sanctions is that the penalties will not be strong enough and that if there is not a serious identification system linked with it that the courts will simply ignore it and that the whole process will be for naught. There is no sense getting into this whole issue if it is not going to have some impact on reducing illegal immigration.

So I would like to see it emphatically stated that people who hire illegal immigrants have violated the law. I think if you couple that with a system of identification, a proper system of identification, I think that employer sanctions could be meaningful.

Just in conclusion, I would say that this issue of employer sanctions has been debated one way or the other for over a decade in Congress. In my view, it is time to act. After all is said and done, more is said than done. I think this topic is certainly a clear example of that principle.

It is time to invoke employer sanctions and to include it as part of a comprehensive package of immigration reform measures. I will stop there.

[The prepared statement of Mr. Briggs follows:]

PREPARED STATEMENT OF VERNON M. BRIGGS, JR.[*]

As the Select Commission on Immigration and Refugee policy stated in its 1981 report, our nation's "immigration policy is out of control." I presume that it is unnecessary to make the case to the Committee that illegal immigration is a serious domestic problem. Or, to warn that it only promises to worsen severely unless action is taken. It is my understanding that the purpose of this particular hearing is to examine only one part of the comprehensive package of reform measures that are to be required if illegal entry into the United States is to be reduced significantly. The subject is the question of the need for sanction against employers who hire illegal immigrants. I strongly support such a proposal but I wish to make it clear from the outset that employer sanctions alone are no panacea. Without the companion reforms needed to reduce both "the push" and "the pull" forces that cause and perpetuate illegal immigration, employer sanctions can accomplish little. It is only as a key part of a comprehensive reform package that sanctions make any sense at all.

The Need

The primary reason for the need for a law to make the act of employing illegal immigrants an illegal act is that it sets the moral tone for the reform drive. As long as the current immigration law permits employers to hire illegal immigrants, no one--either inside or outside this country--can seriously believe that there is any serious desire to stop illegal entry into this country. Employer sanctions are needed to place the stigma of lawbreaker upon those employers who conscientiously or indifferently hire illegal immigrants. It is also intended to discourage through penalties those who might be tempted to hire the illegal immigrant workers.

In my mind, the need for employer sanctions is similar to the need for anti-discrimination laws in employment. Anti-discrimination laws have not made it easier for individuals to prove that they have been discriminated against. Yet these laws have, I believe, contributed greatly to the general enhancement of employment opportunities for minorities and women from the exclusionary employment patterns of just a few decades ago. Much remains to be done but that does not eclipse the fact that significant progress has been made. Much of the progress in the anti-discrimination area has come from voluntary compliance that is reinforced by a plausible penalty system. Whether employers agreed or disagreed with the anti-discrimination laws, many have complied both because it is the law and because they believed that it was within the realm of possibility that they might be prosecuted if they did not. Many employers have searched for minorities and women to be their employees who would not have otherwise made such efforts. Also, because of voluntary compliance, it has been possible for enforcement officials to concentrate their efforts on the worst offenders rather than to dissipate their limited funds in monitoring compliance by all employers. Many employers have done what the law asked--or more--because of the moral indictment that the law imposes on those who do not.

I think the same case can be made with respect to employer sanctions. I believe that many employers of illegal immigrants are simply making a pragmatic response to the reality that faces them. Namely, public policy in this country today implicitly condones illegal entry. As a result, there is an available pool of illegal immigrants in a number of the nation's labor markets who are looking for jobs. Employers are aware that illegal immigrants are less likely to complain about arbitrary wages and work standards than are citizen workers. Moreover, these workers are often grateful for the chance to work--given the alternatives in their homeland. Hence many employers are tempted to tap into this labor pool because it is available and it is profitable to do so. This does not mean that they would go out of business if illegal immigrants ceased to be accessible to them. It is simply a matter of "why not do it?" In some marginal business enterprises, the prod to hire illegal immigrants is often provided by the fear that if they do not take advantage of the availability of cheap and docile illegal immigrants, their competitors will.

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[*] Professor of Labor Economics and Human Resource Studies, Cornell University

It is these employers who I am convinced would--perhaps grudgingly--but, nonetheless, voluntarily comply with an employer sanctions law. They would do so simply because it is the law and, because there is some prospect for punishment if they do not. The moral weight of the law would be on the side of those who comply. This is exactly what has happened with equal employment opportunity law.

Moreover, with the voluntary compliance by some employers, compliance enforcement could be targeted against the remainder who defy or are indifferent to the vital importance of stopping illegal immigration. Included in this group would undoubtedly be the worst employers--those in the minority of the business community who seek illegal immigrants for the specific purpose of exploitation. This is, of course, precisely the group where there is the greatest need to act both to protect the aliens themselves and to protect the existing work standards of citizen workers from being unfairly undermined.

Limitations On Effectiveness

I must concede in this discussion that I am not optimistic that the legal system of the nation will give significant support to the enforcement of employer sanctions if they are enacted. With already crowded court dockets and with defense attorneys who will have a field day with juries over the issue that the only crime their defendant has committed was "to provide a job for someone," there will be a tendency to simply ignore this law. I fear this will be the case unless the law is written in emphatic terms; is without "weasel words" (like the employer must have "knowingly" hired illegal entrants); and has strong penalties for offenders. If these conditions are met, they may serve as a signal to the judicial system that the Congress is serious in its actions.

There is absolutely no reason to pass an employer sanction law if there is no intention to make it as effective as possible. This means that the law must be simple and to the point: employers who hire illegal aliens, have broken the law. It also means that Congress must also provide ample funds and manpower for adequate enforcement.

Identification Issue

Obviously, if an employer sanctions law is enacted, it is necessary to specify exactly what an employer must do to be in compliance. A mere query is hardly sufficient. With fradulent documents readily available both inside and outside the country, existing forms of identification (i.e., birth certificates, social security cards, driver's licenses, etc.) are absolutely insufficient. Without the establishment of some sort of universal identification system, the result of a strong law could be that employers might act in a discriminatory way against people "who look like" or whose language "sounds like" a group that might be composed of illegal immigrants. This concern is real. Hence, the required identification must be something that is required of all work-seekers.

It has been my view that a new form of the social security card should be used. This card must be both non-counterfeitable and unalterable. Through the use of special codes already developed by cryptographers and computer experts it would be easy to verify the citizenship status of any would-be employee. The card would be similar to those currently being issued by the Immigration and Naturalization Service to resident aliens (i.e., the ADIT card or Alien Documentation, Identification, and Telecommunications system). The Social Security card, is already required as a condition of employment in the private sector for virtually everyone. The same is true for most public employees. Like it or not, the Social Security number has already become a national identification identifier. The Social Security number is used as a student number on many campuses; it is used as the driver's license number in many states; it is used by the Internal Revenue Service to identify taxpayers; and it is the serial number of all people in the military. The point is: It is absurd to worry about whether something will happen if it has already happened! The only questions that remain are, should Social Security cards be made noncounterfeitable, and should checks be made of these cards to ensure that those who are using them to seek employment are legally entitled to have them? Certainly no one can seriously disagree with such objectives.

Others who have given close study to the identification issue have recommended a work permit system similar to that used in many other industrialized nations as being better "than any other proposed system."[1] The details of a workable proposal were spelled out in a later study by North.[2] The system would involve a the establishment of a nationwide data base. Workers entering the labor force or changing jobs would be required to acquire a work authorization number that would be on file at the federal data bank. The number would be issued only after the individual offered some proof that he or she was a citizen or resident alien. Employers would only have to call-in to a toll free data bank after they had hired someone to check the citizenship eligibility of the newly hired person. In return, they would receive a transactions number from the data bank that would suffice to be in compliance with the employer sanction provisions. The advantage of this system would be that it would not involve any type of card nor require employers to make any type of judgment themselves about the eligibility of a job applicant. A would-be worker would have to make application for a work permit at the nearest office of the public employment service. Several options would be available to the applicant to prove his or her eligibility through reliance on some sort of historic data (e.g., among these would be proof of payment of income taxes for a number of past years; proof of paid social security taxes for a set number of past years; service in the military; government employment; naturalized citizenship status; etc.) An applicant would have to provide at least two different proofs. Only information provided by the applicant would be on file. A check of the provided information could be made with existing data already on file in various government data banks. If the computers confirmed the individuals legal presence in the nation, the work permit would be issued.

There may be other means available. The point is, a new identification method must be included in any employer sanction program if it has any hope for success.

Penalties

To be credible, employer sanctions must be severe enough to be taken seriously. I think that civil penalties that are set at a minimum of $1,000 per illegal alien should be set with injunction relief that involves criminal contempt and possible imprisonment for repeat violators are called for. Priority should be given to those employers who engage in a "pattern of practice" as determined by the Department of Justice setting.

I realize that cost considerations would become involved in the determination of which cases to prosecutive. I would hope that attention would focus on those employers of large numbers of illegal aliens and those who consistently engage in this practice.

The Reagan Proposals

The Reagan Administrations proposals do not meet the standard outlined above. While grateful that the Administration recognizes the need for reform, I feel that the proposals outlined in the President's message of July 30, 1981 are simply inadequate to the problem. It attempts to do something but not too much. Unfortunately, resolving the problem of illegal immigration allows no middle ground. The only hope for a successful program is a total commitment to the alleviation of the problem. Anything less than that will, in my mind, have no impact. The problem will only get worse. Just as it makes no sense to build a dam only half way across a river, it makes no sense to try to construct a part-way illegal immigration program. It is all the way or nothing.

The most obvious deficiency is with the identification issue. All of the suggested documents are easily and readily available for sale inside and outside the country. Most employers are not trained to discern the authenticity of such documents. If all they have to say is that they "examined" two of these documents, nothing is going to be accomplished--even where the employers are honestly trying to comply. For those other employers who are not sympathetic to the reform drive, the loophole is so large that few, if any, of them could ever be prosecuted.

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[1] David S. North and Marion F. Houston, The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study, Washington, D.C., Linton & Company, 1976, p. 179.

[2] David North, "Keeping Undocumented Workers Out of the Workforce: Costs of Alternative Work Permit Systems", Washington, D.C., New Transcentury Foundation, 1979.

It is not surprising--given the lack of an effective identification program--that the proposal says that only employers who "knowingly" hire illegal immigrants will be in violation. This phrasing will certainly, negate any of the remaining substance of the proposed employer sanctions provisions. Ignorance has never been a successful excuse for failure to comply with other laws. It should not be tolerated in this instance either. Accordingly, the signals that the Administration's proposals give to the court system are entirely the wrong ones. Prosecutions will be difficult and, given other seemingly more pressing matters, prosecuting attorneys can be expected to ignore the sanctions or give them only cursory attention. Without the fear of prosecution, many of the worst offenders will simply take the calculated risk under the belief that the potential benefits will exceed the potential risks. And they will be right.

Conclusion

For over a decade, Congress has been debating the topic of employer sanctions. If ever there is an issue that illustrates the old saying that "after all is said and done, more is said than done," it is this one. It is time to bite the bullet and respond to the reality that a ban of the hiring of illegal immigrants is a necessary fact of life in the industrialized society in which we live. It is time that we fall in line behind the other nations of the Western industrialized world who have already acted in a manner similar to what is proposed here.

Employers sanctions are the linchpin of an effective immigration reform strategy. They are what holds the entire package together. Reform will onl be as effective as the linchpin. I hope Congress will recognize this basic f

Senator SIMPSON. Thank you very much. We will hear from all the members of the panel, and then come back for questioning.

So please, Prof. Mark Miller.

STATEMENT OF MARK MILLER, PROFESSOR, UNIVERSITY OF DELAWARE

Mr. MILLER. Mr. Chairman, employer sanctions are the key component in Western European efforts to curb illegal alien employment and residency. With a few notable exceptions, all Western European governments now have laws which punish employers of illegal aliens with fines and/or prison. Once captured and convicted, the employers also may be obliged to pay back wages and social security taxes that ordinarily would have to be paid if an alien worker had been legally employed.

Further, European employers often are obliged to pay the repatriation costs for illegal aliens in their employ. Recurrent violation of laws governing the employment of aliens may result in employers losing the right to hire aliens altogether.

Although the specific nature of employer sanctions and the administrative processes behind their enforcement vary considerably between Western European countries, the fact that Western European democracies have emphasized this particular policy option in their broader efforts to stem flows of illegal immigrants into their countries is of considerable interest to the United States.

Reference to Western European practices and experience, in light of the present debate in the United States over the advisability of imposing employer sanctions, helps put the issues being debated here in perspective.

Well, as you know, there are two major differences between the United States and Western Europe in the realm of migration policies. The first one is the illegal status of many alien workers in the United States as compared to the legal status of most alien workers in Europe.

The second difference is the traditional U.S. preference for permanent immigration leading to the acquisition of U.S. citizenship as opposed to the general postwar European policy of admitting aliens on a temporary basis with the expectation that these workers would one day return home.

By 1973 it has become apparent that many European guest workers have become long-term residents, a realization that contributed to decisions to halt recruitment. But such key countries as Switzerland and Germamy have not facilitated naturalization, and they do not recognize themselves as immigration countries like the United States.

Bearing these two major differences in mind, the Western European experience with guest workers is pertinent to the issue of proposed employer sanctions in the United States, because despite the fact that large-scale legal opportunities were made available to aliens, illegal immigration and illegal alien employment proved to be persistent problems in Europe.

In the early 1970's it was estimated that a number of aliens equivalent to 10 percent of the legally admitted alien populations resided illegally in most Western European countries. As in the United States, there are few statistics on illegal aliens in Europe, and estimates concerning their total numbers vary considerably.

Nonetheless, it is quite certain that the total number of illegal aliens in Western Europe is far smaller than the illegal alien population in the United States.

Since the 1973–75 recruitment bans, which incidentally are unlikely to be lifted in the foreseeable future, European governments have strengthened employer sanctions but illegal alien populations seem to have remained roughly stable or to have grown.

Some observers impute the presumed increases in illegal immigration and illegal alien employment to the recruitment stops themselves. But any causal relationship is difficult to establish, because significant illegal alien populations and patterns of illegal alien employment had developed alongside of and perhaps because of postwar guest worker policies and populations that they brought in.

In the French case, much of the post-World War II influx of foreign workers came illegally, but these workers had their status legalized in what the French call a "regularization program." In 1968, for example, over 80 percent of the foreign workers in France came in technically as illegal aliens and then had their status legalized.

However, due to mounting political opposition against foreign workers, in general, but particularly against illegal aliens, by 1974 the French Government changed its policy of condoning illegal immigration and made it quite clear that they would no longer tolerate illegal immigration. Consequently, between 1975 and 1980 there is very little adjustment of status in France.

However, with the coming to power of a new government in France, French officials have recently announced a large-scale legalization program once again, and according to LeMonde, French officials expect up to 300,000 illegal aliens to legalize their status in the next few months.

Unlike the French, the Swiss and Germans never allowed any significant legalization of status. They largely rejected this policy. Consequently, the policy context of employer sanctions in Western Europe differs considerably from country to country and between Europe and the United States. Countries like Belgium, the Netherlands, Great Britain, and France have permitted adjustment status or have decreed amnesties for illegal aliens while other countries have not. Most continental European countries have some form of national identity card for citizens, while legally admitted foreign workers and their dependents are required to carry residency authorization at all times.

There are several factors which generally serve to facilitate detection and apprehension of illegal aliens in Western Europe. No. 1, Western European societies, by and large, are more ethnically homogeneous than the United States. Two, the police have freer rein to stop and ask for identity cards in the European context than in the United States. Bearing these factors in mind, I think it of considerable interest nonetheless that European societies have adopted employer sanctions as the primary means of combatting illegal alien employment.

Thank you.

Senator Simpson. Very well done. Thank you for your observance of the time. You certainly have a rich background in the histories of employer sanctions programs in other countries. We will certainly use that.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF MARK J. MILLER

EMPLOYER SANCTIONS IN WESTERN EUROPE
- with special reference to France -

Employer sanctions are the key component in Western European efforts to curb illegal alien employment and residency. With a few notable exceptions, all Western European governments now have laws which punish employers of illegal aliens with fines and/or prison terms. Once detected and convicted, employers also may be obliged to pay back wages and social security taxes that ordinarily would have been paid if an alien worker had been legally employed. Further, European employers often are obliged to pay the repatriation costs for illegal aliens in their employ. Recurrent violation of laws governing the employment of aliens may result in employers losing the right to hire aliens all together.

Although the specific nature of employer sanctions and the administrative processes behind their enforcement vary considerably between Western European countries, the fact that Western European democracies have emphasized this particular policy option in their broader efforts to stem flows of illegal immigrants into their countries is of considerable interest to the United States. Reference to Western European practices and experience in light of the present debate in the United States over the advisability of imposing employer sanctions helps put the issues being debated here in perspective.

The Policy Context of Employer Sanctions in Europe

Unlike the United States, most countries in Western Europe permitted large-scale recruitment of nonimmigrant or temporary alien labor in the postwar period. By the early 1970s, foreign workers represented nearly 10 percent of the total workforces of France and the Federal Republic of Germany and 30 percent of the workforce in Switzerland. Over three-quarters of Western Europe's 12 to 14 million foreign workers and their dependents live in these three countries alone. In the 1973 to 1975 period, one European country after the other stopped recruitment of foreign labor. This halt was due to worsening economic conditions and growing socio-political problems stemming from guest-worker policies.

The major comparative differences between the United States and Western Europe in the realm of migration are (1) the illegal status of many alien workers in the United States as compared to the legal status of most alien workers in Europe and (2) the traditional U.S. preference for permanent immigration leading to the acquisition of U.S. citizenship as opposed to the general, postwar European policy of admitting aliens on a temporary basis with the expectation that these workers would one day return home. By 1973, it had become apparent that many European guestworkers had become long term residents, a realization that contributed to decisions to halt recruitment, but such key countries of guestworker employment as Germany and Switzerland to this day make naturalization very difficult and do not recognize themselves as immigration countries like the U.S.

Bearing these two major differences in mind, the Western European experience with guestworkers is pertinent to the issue of proposed employer sanctions in the U.S. because, despite the fact that large-scale legal opportunities were made available to aliens, illegal immigration and illegal alien employment proved to be persistent problems in Europe. In the early 1970s, it was estimated that a number of aliens, equivalent to 10 percent of legally-admitted alien populations, resided illegally in most Western European countries.[1] As in the United States, there are few statistics on illegal aliens in Europe and estimates concerning their total numbers vary considerably. Nonetheless, it is quite certain that the illegal alien population of Western Europe is considerably smaller than the illegal alien population in the United States. Whether this apparent difference is due more to European policies legally admitting alien workers on a temporary basis or to sanctions taken against illegal employment in Europe is not clear.

Since the 1973-75 recruitment bans, which are unlikely to be lifted in the foreseeable future, European governments have strengthened employer sanctions but illegal alien populations seem to have remained stable or to have grown. Some observers impute the presumed increases in illegal immigration and illegal alien employment to the recruitment stops but any causal relationship is difficult to establish because significant illegal alien populations and patterns of illegal alien employment had developed alongside of, and perhaps because of, postwar guest-worker populations.

In the French case, much of the post-World War II influx of foreign workers came illegally but quickly had their residency and employment status legalized through a "regularization" program. In 1968, over 80 percent of incoming migrant workers had their technically illegal status "regularized" which indicates that illegal immigration was largely condoned by the government during periods of labor shortages. Mounting political opposition to foreign workers in general, but particularly against illegal aliens (immigration sauvage), led to a progressive reversal of policy. By 1974, the French government had made it clear that it would no longer tolerate illegal immigration and that adjustment of status for illegal aliens would end. From 1975 to 1980, the French government only occasionally permitted adjustment-of-status for illegal aliens estimated to number between 250,000 and 500,000 throughout France.[2] Since the recent elections and change of government, however, a new, one time only, legalization program has been inaugurated and French officials expect up to 300,000 illegal aliens to adjust their status in the next few months.[3]

Unlike the French, the Germans and Swiss have rejected adjustment of status policy. While some aliens were permitted to legalize their status in Germany until 1972, both the Swiss and Germans reject the French approach in part because large-scale illegal alien inflows were never tolerated and consequently illegal alien populations apparently have not been as large. It is estimated that there are between 200,000 and 300,000 illegal aliens in Germany while the number of illegal aliens in Switzerland is thought to be very small with no official estimate available.[4] In the past, the most serious illegal alien problem in Switzerland involved the children and spouses of seasonal workers who were admitted for periods of up to 11 months but who are not legally entitled to bring in their dependents except for visits. Usage of the term, illegal alien, in the Western Europe context actually refers to four quite distinctive violations as it does in the American context. Hence, illegal aliens can be (1) individuals who enter the country without undergoing any sort of control; (2) individuals who are entitled to stay but who illegally extend their period of stay, (3) individuals who are entitled to stay but work without authorization and (4) individuals who had been authorized to work but work beyond the authorization period or take jobs for which they lack authorization.[5] In comparison to the French and Germans, the Swiss seem to have experienced very little of the first kind of immigration law violation while what problems they have seem to involve primarily the second and third types of violations.

The policy context of employer sanctions in Western Europe, then, differs considerably from country to country in Europe and between Western Europe and the United States. Countries like Belgium, the Netherlands, Great Britain and France have permitted adjustment of status or have decreed amnesties for illegal aliens as part of broader policies aimed at reducing illegal alien populations while other countries, such as Germany and Switzerland, have not. Most continental European countries have some form of national identity card for citizens while legally admitted foreign workers and their dependents are required to carry residency authorization at all times. Among major Western European states, Great Britain is exceptional in that it resembles the U.S. situation of not requiring citizens to obtain some sort of national identification card. As in the United States, the British see identity papers as a potential threat to civil liberties.

There are several other factors which generally serve to facilitate efforts to thwart illegal immigration and illegal alien employment in the European context as opposed to the United States. In several Western European countries, police forces and other authorized officials have much freer rein to conduct identity checks aimed at discovering illegal aliens than in the United States. Until the recent change of government in France, for example, the police regularly checked identity papers in the Paris metro and, less frequently, cordoned off entire neighborhoods thought to contain large numbers of illegal aliens while systematically demanding identity papers from individuals suspected of being illegal aliens. In 1980, a law was passed in France that would have enabled the government to computerize records pertaining to national identity cards and alien work and residency permits. According to recent press reports, however, the new French government intends to abolish the law which would have permitted the storage of such information in a nationwide computer system. In many European countries, such as in Germany, Switzerland and France, official monitoring of aliens is facilitated by regulations which require aliens to report to the local police when they take up residency in a town or city and then to report any change of address. In countries like Belgium and Switzerland, special police forces have been created to regulate inflows and outflows of aliens.

More generally, most Western European countries do not have immigration traditions and are more ethnically homogeneous than the United States, especially if one can disregard for the purposes of this presentation so-called national or regional minorities such as the Scots in Great Britain or the Bretons and Corsicans in France. The relative ethnic homogeneity of European countries facilitates administrative control of aliens in general and detection of illegal aliens in particular as compared to the United States. European countries with significant minority populations that could suffer prejudice as a result of random identity checks or an obligation to prove citizenship before taking a job include France, which has a large population of citizens of North African, sub-Saharan African and West Indian descent, Great Britain with its large immigrant citizen populations from India, Pakistan and the West Indies, and the Netherlands with its citizens from former colonies in the Caribbean region and from Indonesia. Simmering resentment over frequent identity checks actually seems to have been a factor in the recent British disturbances and French identity controls also have resulted in incidents between the police and citizens of North African background who feel they are being harassed.[6] In countries like Norway or Germany, by way of contrast, there are relatively few citizens who physically and linguistically resemble major resident populations of legally admitted aliens and illegal aliens.

Although it is widely believed here in the United States that our almost 2,000-mile long border with Mexico presents a unique problem in regulating alien inflows, it should be pointed out that Western European countries also must regulate huge inflows of aliens who come as tourists, visitors, workers, students or in transit. In France, for example, it was recently estimated that 500,000 aliens enter the country each day.[7] Other countries, such as the Federal Republic of Germany, have special problems in regulating alien entry. Due to the special status of West Berlin, for example, it is quite easy for aliens to fly to East Berlin and then to enter West Berlin on the subway that links the divided halves of that city as there are no identity controls. Large numbers of aliens from the Near East, India and Pakistan have been able to take up illegal residency and employment in West Berlin, and from there throughout West Germany, due the peculiar status of Berlin. The permeability of Western European frontiers to potential illegal aliens, the impossibility of stopping all would-be illegal aliens at national borders because of international and bilateral travel conventions, tourist industries, foreign student admissions and visiting rights accorded families of legally admitted aliens, together with the reluctance of democratic societies to inhibit the free circulation of individuals, have been decisive factors in European decisions to adopt employer sanctions as a primary means of preventing illegal alien residency and employment. Hence, one should not exaggerate the putative uniqueness of the U.S. immigration situation arising from our long border with Mexico. European countries also have enormous problems regulating alien inflows.

A Comparative Summary of Employer Sanctions Across Europe

Penalties against the employers of illegal aliens in Western Europe became important features of governmental policies toward migrants only in the 1970s. Two major factors seem to account for the European-wide emphasis upon employer sanctions by the mid-1970s: (1) the adoption in 1975 by the International Labor Organization of Convention 143 pertaining to migration in abusive conditions and to equality of opportunity and treatment for migrants and; (2) the general economic recession brought on by the oil crisis. A third contributory factor would appear to be the politicization of postwar foreign labor policies and resultant pressure to stop or more closely restrict additional foreign worker employment.

Part I of Convention 143, among other provisions, requires each ratifying government to seek systematically to determine whether there are illegally employed aliens on its territory. Governments are required to take all necessary measures to suppress clandestine movement of aliens and their employment, including measures against employers of illegal aliens. ILO conventions, if ratified, have the force of international treaties. Although no Western

European states have as yet ratified Convention 143, its adoption by the ILO meant that member states would be asked to report on what measures, if any, they had taken to comply with the provisions of Convention 143. Generally, Western European states are responsive toward ILO instruments, especially if key domestic interest groups embrace them. Organized labor, among other interest groups in Western Europe, generally supported the idea of employer sanctions enunciated in Convention 143 as well as approving penalties against traffickers of aliens. In addition to employer sanctions, legislation stipulating harsh penalties for persons involved in smuggling aliens, or otherwise abetting clandestine entry and residency by aliens, has become a key element of European policies aimed at stemming illegal immigration.

In 1978, the European Economic Community (EEC) Commission announced its intention to seek a joint European policy against illegal immigration.[8] The EEC, now more appropriately referred to as the European Community, is composed of ten Western European states, including France and the Federal Republic of Germany but not Switzerland. The EEC Commission wished to see employer sanctions resembling those of Germany adopted by the entire community. At present, employers of illegal aliens in Germany are subject to fines of up to 50,000 Deutsch marks (roughly $20,000) and/or prison terms of up to five years. The EEC Commission's statement concerning employer sanctions, however, was an advisory opinion only. Nonetheless, it added momentum to the now nearly uniform movement by Western European states toward adoption of employer sanctions.

Table 1, listing the types of employer sanctions adopted or not adopted by ten Western European states, indicates that most European countries have adopted some form of employer sanctions. Fines and jail terms for convicted employers of illegal aliens generally are stiff, although Austrian law does not permit imprisonment of employers of illegal aliens. In Great Britain, where there are no employer sanctions *per se*, employers can be punished if it is determined that they are abetting illegal alien residency. In Switzerland, provisions of the legislation governing alien employment and residency do not explicitly include penalties for illegal alien employment but *de facto* employer sanctions (fines and prison terms) exist. In Germany, where 9,335 employers were fined in 1976, a government-backed bill which currently is in committee and likely to be adopted as law, would raise the fine levied on employers of illegal aliens to 100,000 Deutsch marks or roughly $40,000.[9]

Table 1

Types of Employer Sanctions in Western Europe

Country	Fines	Imprisonment	Requirement to pay back wages, social security and/or the cost of repatriation of illegal alien	Lose rights to hire aliens after repeated violations
Austria	Yes	No	Yes	Yes
Belgium	Yes		Yes	
France	Yes	Yes	Yes	Yes
Germany	Yes	Yes		
Luxembourg	Yes	Yes	Yes (exc. repatriation)	
Netherlands	Yes		Yes	
Norway	Yes	Yes		
Sweden	Yes	Yes	NO	NO
Switzerland	Yes	Yes	Yes	Yes
United Kingdom	No	No	No	No

Primary Source: International Labour Conference, Migrant Workers, Report 111 (Part 2), (Geneva: ILO, 1980.)

French Employer Sanctions

Perhaps because of past tolerance of large-scale illegal alien immigration and employment up to 1973-74, the French government moved decisively in 1976 to curb illegal immigration and employment. A law providing for fines of up to 3,000 Francs (roughly $600) and jail terms of up to one month was enacted. The penalties could be doubled for repeat offenders. Simultaneously, an interagency (or interministry) authority was established to coordinate governmental efforts to curb illegal immigration and illegal alien employment. No less than five distinct enforcement agencies may impose employer sanctions in France.

French law requires employers to maintain a special register indicating the names of alien workers, the date of their hiring, their nationality and the nature of the document authorizing aliens to work. All persons not in possession of French national identity cards or passports must have valid work and residency permits to seek employment. In the cases of most aliens from former French colonies, their residency permits must be stamped salaried worker before employers can legally hire them. Employers are obliged to notify authorities when they hire alien workers. These notifications must include the name and nationality of the alien hired and the date of his or her hiring.

The various agencies involved with enforcement of laws against illegal alien employment are free to inspect factories and other known places of employment. However, they generally need court authorization to inspect private residences. There is a corps of inspectors specifically assigned to suppression of illegal alien employment. In 1979, these inspectors specialized in migrant workers are recorded to have made 5,044 field inspections involving firms employing 139,234 persons of whom 48,151 were aliens.[10] Table 2 indicates the total number of investigations reported by each enforcement agency for the

Table 2

Investigations of French Employers Suspected of
Employing Aliens Illegally on which
Reports were Filed, 1976-79, by Service

Year	Police	Labor Inspectors	Gendarmerie (National Police)	Agricultural Inspectors	Transportation Inspectors	Total
1976	370	580	317	43	6	1,316
1977	622	720	697	87	7	2,133
1978	589	618	516	88	5	1,816
1979	283	468	557	77	4	1,389

Source: Mission de liason interministerielle pour la lutte contra les trafics de main d'oeuvre, Bilan, (Paris: Secretariat d'etat aupres du Ministre du Travail et de la Participation, August, 1980), p. 8.

Table 3

Investigations of French Employers Suspected of Employing Aliens Illegally on which Reports were filed, by economic sector, 1976-79

Economic Sector	1976	1977	1978	1979
Agriculture	184	351	303	266
Steelworks	61	91	68	44
Building	397	588	443	373
Wood-related	25	24	15	7
Paper	10	5	1	-
Chemical	29	8	1	-
Food	25	47	27	16
Transportation	18	30	32	22
Services	251	366	221	258
Maintenance/Cleaning	39	50	30	24
Temporary Work	42	50	38	31
Textile	100	158	122	57
Hotel	-	-	232	158
Other	148	297	268	133
	1,329	2,065	1,801	1,389

Source: Mission de liason interministerielle pour la lutte contre les traffics de main-d'oeuvre, Bilan, (1980), p. 8.

Table 4

Number of Infractions Revealed by
Investigations and the Number of
Illegally Employed Aliens Involved, 1976-1979

	Infractions	Aliens Involved
1976	2,963	2,235
1977	4,458	3,858
1978	4,414	3,371
1979	3,793	2,707

Source: Mission de liason interministerielle pour la lutte contre les trafics de main d'oeuvre, p. 10.

period 1976-79. Table 3 breaks down the investigations by relevant economic sectors. The number of infractions discovered and illegal aliens involved are contained in Table 4.

France has a total population of around 53 million and a labor force of about 22 million, including almost 2 million legally employed aliens and over 4 million legally resident aliens. Hence, the work force inspected in the field by agents specialized in suppressing illegal alien employment amounts to only a small percentage of the total workforce. The decline in investigations subsequent to field inspections of agents, is not imputable to variations in rates of inspection which have remained roughly constant over the years. Rather, according to French governmental sources, the decline in investigations indicates a decline in relatively easy to detect illegal alien employment in urban areas.[11] Employer sanctions and their enforcement have had an obvious deterrent effect upon many employers but French authorities are careful to note that sanctions have driven some employers and the illegal aliens they hire further underground. Employers of illegal aliens in urban areas have become more sophisticated as evidenced by the scandal discovered in the Parisian garment industry in 1980. Employers were able to hire large numbers of illegal aliens and escape detection because they used apparently legitimate "front" corporations to cover illegal business transactions. Industries which seem particularly prone to illegal alien employment include agriculture, hotels and restaurants which employ large numbers of seasonal workers. About 125,000 seasonal workers are admitted annually for temporary work for periods of up to eleven months. This alien labor flow was not affected by the recruitment stop of 1974.

Table 5 reveals the number and nature of court actions taken against employers of illegal aliens in recent years. The high number of dismissals stems from a certain inadaptation of the legal system to the problem of illegal alien employment and certain evidentiary problems. A recent report made to the Ministry of Labor recommended stiffer penalties for employers of illegal aliens and regulatory reforms which facilitate convicting such employers.[12]

Convicted employers of illegal aliens are also subject to an administrative fine levied by the National Immigration Office. The fine is 500 times the minimum guaranteed wage per hour. In 1980, this fine amounted to 4,275 Francs (roughly $1,000). Not all convicted employers have been assessed the fine, however, because of administrative foul-ups.

Although employer sanctions in France have a discernible deterrent effect, they have not resulted in a detectable decline in illegal alien residency and employment after four years. The new French government will probably step up enforcement of laws against illegal alien employment. Employers convicted of hiring illegal aliens were pointedly not extended amnesty or parole as so many other offenders were when President Mitterand took office.

Implications of European Employer Sanctions for the U.S. Debate

The fact that most Western European states have employer sanctions and that these sanctions have had some positive impact upon efforts to suppress illegal alien immigration and employment clearly does not mean that similar employer sanctions in the U.S. context would necessarily produce the same beneficial results. Although the United States fundamentally resembles European states in that we share democratic institutions and high technology, capitalist economies, there are important transatlantic differences which could very well alter the effects of employer sanctions here in the United States. Consequently, any conclusions or lessons to be drawn for the U.S. debate over employer sanctions from the European experience in this area must necessarily be guarded.

Table 5

Sanctions Levied Against Employers of Illegal Aliens in France 1976-1979

					Fines				Imprisonment				
Year	First Offense Case Dropped	Case Dismissed	Nolle Prosequi	Penalty Forgiven	Less than 600 FF	600-2000	2000+	Suspended Fine	Less than 2 months	2-6 mos	6 mos+	Suspended Sentence	Total
1976	57	105	12	-	285	46	12	8	-	1	-	3	536
1977	231	321	36	1	1069	297	47	28	25	43	30	65	2193
1978	209	324	48	3	1504	444	70	62	11	36	15	64	2790
1979	128	243	51	12	1310	353	32	30	16	23	10	84	2292

Source: Mission de liason interministerieile pour la lutte contre les trafics de main d'oeuvre, pp. 12-13.

The reality of significant historic, ethnic and other contextual differences both between Western European states and between Western Europe and the United States must be constantly borne in mind. Nonetheless, reflection upon the Western European experience with employer sanctions is instructive in several ways.

First, the fact that most Western European states have adopted employer sanctions reinforces international expectations that the United States also adopt employer sanctions. While the United States' sovereign prerogative to decide who to admit is universally recognized, there exist international norms pertaining to immigration policy which cannot be ignored. In this age of interdependency, successful immigration policy requires international cooperation with reference to international norms and guidelines such as those contained in ILO Convention 143.

Second, the experience of France, which has a considerable citizen population of the same ethnic background as legally and illegally present alien populations, would tentatively indicate that employer sanctions will not necessarily result in additional discrimination against minority groups and legally resident aliens who employers might suspect to be illegal aliens. Despite very serious problems of racism and discrimination in France against persons of North African and sub-Saharan African descent, both citizens and noncitizens, it does not appear that employers have discriminated against legal job seekers of North African and black African background because of a fear that they will be running a risk of unintentionally hiring illegal aliens, being discovered and then punished. France has had an anti-discrimination law since 1972 and there seem to be few, if any, complaints of discrimination against persons of North African descent because of the adoption of employer sanctions. There are tremendous problems of discrimination and racism in France but employer sanctions are seen as lessening discrimination by punishing employers who exploit aliens rather than as exacerbating problems of discrimination. As a major fear in the United States is that employer sanctions will result in additional discrimination against U.S. citizens and legally resident aliens of hispanic background, the apparent absence of such an effect in France is noteworthy and perhaps should be further researched.

On the other side of the ledger in terms of the U.S. debate over employer sanctions, the fact that employer sanctions in France have had the effect of driving employers of illegal aliens further underground lends credence to the fear often expressed here in the United States that employer sanctions would worsen the employment conditions of illegal aliens not end them. The illegal alien problem in France is apparently as serious now as it was in 1973. Employers of illegal aliens have proven to be ingeniously adaptive but perhaps the arrival in power of a government even more committed to stopping illegal alien immigration and employment than the previous government will remedy this disquieting problem.

Footnotes

1. Jacqués Houdaille and Alfred Sauvy, "L'immigration clandestine dans le monde," Population Vol. 29, No. 4-5 (July-October 1974).
2. Catherine Wihtol de Wenden, Undocumented Migrant Workers in France, (unpublished paper, 1980), p. 3.
3. See, Le Monde.
4. See, Carl Schurz Association Rundschau, May, 1975, p. 4 and The Washington Post, October 31, 1974. The German Tribune of March 7, 1974 put the number at 500,000.
5. C. Wihtol de Wenden, op. cit., p. 1.
6. See, for illustrations, Jeune Afrique, No. 948, March 7, 1979, p. 45 and Droit et Liberte, No. 379, April, 1979, p. 7.
7. Le Monde, May 31, 1979, p. 13.
8. Jonathan Power, "The Great Debate on Illegal Immigration...," Journal of International Affairs, Vol. 33, No. 2, Fall/Winter 1979, p. 245.
9. David North, "Foreign Workers: Unwanted Guests," Transatlantic Perspectives, No. 1 (June, 1979), p. 20.
10. Mission de liason interministerielle pour la lutte contre les trafics de main d'oeuvre, Bilan, (Paris: Department of Labor, 1980), p. 26.
11. Ibid, p.6.
12. Mission de liason interministerielle ..., Le Travail Illegal, (Paris, Department of Labor, 1980), p. 28.

Senator SIMPSON. Now, Mr. David North, it is nice to see you, sir, again.

STATEMENT OF DAVID NORTH, DIRECTOR, CENTER FOR LABOR AND MIGRATION STUDIES, NEW TRANSCENTURY FOUNDATION

Mr. NORTH. Thank you, Senator.

Mr. Chairman, first of all, let me state, without arguing the case, where we stand on the question of employer sanctions. I regard employer sanctions as necessary, and I regard them as desirable for two reasons.

The first reason is that they are needed to protect the interests of disadvantaged legal workers from the adverse effects caused by the employment of illegal immigrants. Second, I think it would be appropriate to have employer sanctions as a matter of employer-employee equity.

The adverse effects on U.S. workers of substantial illegal immigrant employment is the point that Professor Briggs has already covered.

There are two effects of concern: The indirect effect, which is not often stressed, of depressing wages and working conditions for U.S. workers where illegal immigrants cluster in substantial numbers; and second, the more obvious direct effect of worker displacement in many cases.

As to the question of equity, if it is illegal for an illegal immigrant to work for an employer, it should be—as it is not now—illegal for the employer to hire that illegal immigrant worker.

Currently, the burden of enforcement falls almost totally on the hapless illegal immigrant. If he is found out of status in his job, he is thrown out of the country, sometimes at considerable financial cost to him. The employer is merely inconvenienced. And I think that that is an inappropriate arrangement.

I would like to turn to two other questions that relate to this. I would like to talk about the strategic thinking that is in the minds of some, not always articulated, regarding employer sanctions. And second, I have some comments on how the Reagan administration's support of at least a modest employer sanctions program fits in, or perhaps does not fit in, with some of its other policy decisions.

As to strategic thinking, I think that one of the underlying thoughts here of people advocating employer sanctions is despair of controlling the adverse effects I have mentioned in any other way. That may or may not be incorrect.

I, too, believe that there ought to be a package as Mr. Briggs has suggested. I think there should be an international package to assist in preventing some of the push factors in the area around the Caribbean basin, but just in terms of enforcement, I think that there are currently about four general arenas for immigration law enforcement.

One is enforcement within the nonimmigrant stream, that is, of people coming to the country through the ports of entry with visas, passports, and usually airline tickets. There are two elements of that. One can enforce that at the point of visa issuance. One can enforce with a little more difficulty at the port of entry, denying somebody entrance who is misusing a document. That is one arena within the nonimmigrant stream. We do not do very much, and I have written, as I think you know, for the former Select Commission on that point.

We can enforce between the points of entry. This is the kind of activity which is most likely to be noticed and more likely to be funded, and that is the Border Patrol. That is a legitimate activity. It probably could be enhanced, but that is just another area of possible enforcement of immigration law.

A third area is enforcement in the communities where the illegal immigrants live. In the past the INS agents would simply station themselves in a location where they suspected that there were illegal immigrants and stop them and inquire as to their legal status in the country, as is done commonly in Western Europe.

This kind of enforcement, although not unknown, is becoming less utilized, partially because of some court decisions and partially because of administrative decisions made within the INS to downplay that kind of activity.

The fourth general area for immigration law enforcement is in the workplace. INS agents have long used industrial visits—I think that is the latest euphemism—as well as farm and ranch checks—that is a Border Patrol euphemism—to seek out illegal immigrants while they are working.

The disadvantage of this activity is, first, it is not funded as thoroughly as some of the work right at the border by the Border Patrol. And second, the burden, as I have mentioned before, falls totally on the employee, never on the employer, and hence, there is no stimulus for causing the employer to change his hiring patterns.

Advocates of employer sanctions, while not giving up on increased immigration law enforcement in these other arenas, have adopted an overall strategy of seeking a new barrier to illegal immigrants at the employer's door rather than seeking the same goal through enhanced enforcement in the other three arenas. I think it is useful to be reminded of that.

Let me close by noting an anomaly. This administration has opposed a modest employer sanctions program which will be helpful to disadvantaged workers if enacted. I find this interesting, because the administration has shown that its approach to disadvantaged workers generally is, shall we say, somewhat different from that of previous administrations: Funding for CETA has been reduced; efforts to secure labor market equity for blacks, Hispanics, and women have been cut, and so forth.

Meanwhile, the administration has announced that it will do all in its power to reduce Government regulation of business and to reduce Government expenditures. Any employer sanctions program of any significance would add reporting requirements to employers and cost money to administer.

Those who feel, as I do, that the administration has taken only a small step in the right direction should bear in mind that what the administration is advocating runs counter to its general philosophy of how the Nation should be governed. I do not know how significant this analysis is, but it is reassuring to learn, I suppose, that this administration, like its predecessors, is not a monolith.

Senator SIMPSON. Thank you very much, Mr. North.

[The prepared statement of Mr. North follows:]

PREPARED STATEMENT OF DAVID S. NORTH

Mr. Chairman, my understanding of these two days of hearings is that today's subject is whether or not a law should be passed making it illegal for an employer to hire illegal immigrants, i.e., should we adopt employer sanctions? This is a question of national policy. Friday's hearings deal with the related question, if we are to have employer sanctions should such a program be supported by a worker identification system, and, if so, what should it entail? These are questions of tactics, as opposed to grand strategy. Since I will be a witness both days, let me discuss the policy question today, and the tactics on Friday.

My position on the issue is that employer sanctions are needed for two reasons: (1) to protect the interests of disadvantaged, legal workers from the adverse effects caused by the employment of illegal immigrants, and (2) as a matter of employer-employee equity.

The adverse effects on U.S. workers of substantial illegal immigrant employment is a point that Professor Briggs will cover more thoroughly during these hearings, so let me say briefly that my studies have indicated that when illegal immigrants cluster in a specific labor market, they tend to freeze wages and working conditions, causing adverse effects both to U.S. workers who work in those labor markets, and even more adverse effects to U.S. workers who are shouldered out of the labor market by illegal immigrant worker competition. Both of these effects are of concern, the indirect effect of depressing wages and working conditions for U.S. workers and the more obvious direct effect of worker displacement.

Secondly, there is the question of equity. If it is illegal for an illegal immigrant to work for an employer, it should be (as it is not now) illegal for the employer to hire that illegal immigrant worker. Currently the burden falls totally on the hapless illegal immigrant. If he is found to be working out of status, he is thrown out of the country, sometimes at considerable financial cost to him. The employer is merely inconvenienced -- he has to find another worker. The employer is not penalized for his part of a two-way arrangement (employment), and that is inherently unfair.

Since at least two of the other witnesses on this panel will be discussing labor market issues, Professor Briggs from a domestic U.S. point of view and Professor Miller from that of Western Europe (where most industrial democracies have adopted employer sanctions legislation), I should like to turn to two other, related subjects. First, I would like to discuss the underlying strategic thinking that is more often assumed than articulated by those supporting employer sanctions. Second, I will make some comments on how the Reagan Administration's support of at least a modest employer sanctions program fits with some of its other policy positions.

One reason those concerned with the labor market activity of illegal immigrants advocate employer sanctions is because they despair of controlling these adverse effects in any other way. This is probably correct, but it is a notion that warrants at least some consideration by this body. With this in mind, let us examine the strategic options within the broad field of immigration enforcement.

The broad objective of immigration law enforcement is to establish some control over the movements across the borders of citizens of other lands. Establishing such control is, of course, not free. It costs money to enforce any law, and, perhaps more important in immigration law enforcement are the non-monetary costs. One must devise a constant series of tradeoffs between enforcement, per se, on one hand, and concerns for international movements of people, on the other. Too much enforcement or ill-focused enforcement may hinder the tourist business, and, more importantly, violate the rights, or sensitivities if legitimate travelers, including legal U.S. residents.

There are four arenas in which the immigration law is enforced:

1) Enforcement within the tourist stream. Visas issued to nonimmigrant visitors, and those visitors flow through the ports of entry where they are subject to a truly mass-production decision-making process, the determination by the immigration inspector (or Customs colleague) to admit or not admit a candidate for admission.

2) Enforcement between the ports of entry. The Border Patrol seeks to apprehend those crossing the border without appropriate papers. Most of the million or so apprehensions made by INS are made at the border. Activities 1 and 2 deal with flows of aliens passing through the border areas. The other two enforcement modes deal with populations of illegal immigrants within the nation.

3) Enforcement in the communities in which the illegal immigrants live. In the past INS agents would simply station themselves in a location where they suspected there were illegal immigrants -- such as in certain New York subway stations -- and question persons that met the agents' profiles of likely illegal migrants. Homes, hotels, and migrant camps were raided. This kind of enforcement, although not unknown, is becoming less utilized, partially because of court decisions and partially because of administrative decisions made within INS.

4) Enforcement in the work place. INS agents have long used industrial visits to enforce the immigration law within cities, and farm and ranch checks to do so in the countryside. But the disadvantage has always been that only the aliens are penalized -- no penalties are assessed on employers, and hence there is no stimulus causing the employer to change his hiring patterns.

Although I think that there are sound reasons for improving the level of law enforcement within the tourist stream and making such enforcement self-financing, a subject I have covered elsewhere*, there are strong arguments against either limiting the number of visas that we provide to nonimmigrants, or carefully scrutinizing travelers at the ports of entry. Such activity may be seen as causing the U.S. to be less attractive to foreign visitors, and to create delays for returning U.S. legal residents. Similarly, there are objections, some sound, some less so, for substantially increasing enforcement between the ports of entry and within the U.S. community generally.

Advocates of employer sanctions, while not giving up on increased immigration law enforcement in other arenas, have adopted an overall strategy of seeking a new barrier to illegal entrants (at the employer's door) rather than seeking the same goal through enhanced enforcement in the other three arenas. They also argued that enforcement within the work place will be much more focused, and will be both more effective, and less intrusive on others, than enhancing immigration law enforcement elsewhere.

Let me close by noting an anomaly. This Administration has proposed a modest employer sanctions program, which will be helpful to disadvantaged workers. I find this interesting because the Administration has shown that its approach to disadvantaged workers is, shall we say, different from that of the previous Administration. Funding for CETA has been reduced, efforts to secure labor market equity for Blacks, Hispanics and women have been cut back sharply, income transfer benefits for the working poor have been slashed, and so forth.

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*David S. North, Enforcing the Immigration Law: A Review of the Options (Washington: New TransCentury Foundation, September 1980). Prepared under contract to the Select Commission on Immigration and Refugee Policy.

Meanwhile, the Administration has announced that it will do all in its power to reduce government regulation of business, and to reduce government expenditures. Here again, we find that the employer sanctions program would add more reporting requirements for employers and cost money to administer. (The President, to continue the anomaly, announced last week a 12% across-the-board reduction for virtually all government agencies, but excluded INS from that reduction.)

Those who feel as I do, that the Administration is only a small step in the right direction, should bear in mind that what the Administration has found necessary in this field, immigration law enforcement, runs counter to its general philosophy of how the nation should be governed. I don't know how significant this analysis is, but it is reassuring to learn, I suppose, that this Administration, like its predecessors, is not a monolith.

Mr. Parker, please.

STATEMENT OF DOUGLAS L. PARKER, DIRECTOR, INSTITUTE FOR PUBLIC REPRESENTATION, GEORGETOWN UNIVERSITY LAW CENTER

Mr. PARKER. Thank you, Senator. My name is Douglas Parker. I am director of the Institute for Public Representation at the Georgetown University Law Center. I have approached the issues today from a rather different perspective from that of the other panelists. Our perspective is that of a group of attorneys who are concerned about civil rights advocacy, on the one hand, and issues of regulatory reform and cost-benefit analysis, on the other hand.

I would like to highlight certain aspects of my written testimony, if I could, in light of some of the testimony that we have heard earlier today. There has been a lot of discussion on the question of employment discrimination. We have prepared a paper which I have submitted for the record which discusses a number of aspects of the relationship between employer sanctions and employment discrimination.

There are certain aspects of it which we have not discussed today, however. One is the question of whether imposing on employers the obligation to look into the backgrounds of persons who are coming to apply for a job creates a new sort of atmosphere of discrimination, a new relationship between the employer and the job applicant, which we really have not had before. To some extent, such a procedure carves out an exception to the general prohibitions against discrimination in our hiring practices. That concerns me because there may be some spillover there into the rights not simply of Hispanic workers but also into the rights of other minorities, women, and the disabled. I think that the risk of creating a new sort of discrimination atmosphere is substantial.

The administration's proposal has not been very well received here today, and I think for good reasons. Frankly, I cannot imagine that they are serious about proposing employer sanctions given the type of proposal that they have made. It seems to be simply the worst of all possible worlds as far as discrimination is concerned. I am not comforted at all by their assurances that they would attempt to enforce the antidiscrimination laws to make up for any discrimination they would create.

I know, Senator Simpson, you recognize the problems in the administration's proposals, and you have suggested, as have a number of other people, that the answer to possible problems of discrimination may be the creation of some sort of secure ID card. Let me address some of the ID card questions. I am not certain that the ID card is going to be sufficient to solve all of the problems of discrimination that we are dealing with here. Let us put aside for a moment the basic question of equality of access to an ID card system. I think there is some possibility that the very process of getting the ID card in the first place could have a discriminatory impact on, say, black young people who are trying to get an ID card.

Second, I do not think there has been enough inquiry into the question of exactly what the employer is going to do with the ID card when he gets it. That is, when someone comes to apply for a job, we have said it is the employer's obligation to "check the ID card". I am not certain we know exactly what that means yet, and I think it is important that we define what the obligation of the employer is going to be to determine whether he has been presented with a valid ID card.

There is some talk about the card being noncounterfeitable. I am not certain how that is going to work. I am not certain how a small employer out in the Midwest someplace is going to really be able to determine whether or not an ID card that is presented has actually been counterfeited or not.

There has not been enough analysis of that particular question, and I hope that perhaps in your hearings on Friday there will be an inquiry into that both from the standpoint of whether something can really be counterfeited or not and also from the standpoint of what the employer's obligation is.

The other point that disturbs me about employer sanctions, and I think this is terribly important, is that you have said, and I think everyone has said, that you would not accept any kind of ID card system that did not require that card to be presented by every person who comes in; that is, that every person, black, white or whatever would have to present that ID card. There is, however, a difficult question of how you are going to enforce that.

If the enforcement turns on whether or not somebody has actually employed an undocumented worker, then there really is no incentive to comply with a requirement that the card be checked for every worker. What you are going to have to do in order to enforce that is to enforce your whole system against every employer who does not go through the mechanics of asking for that ID card, even if that employer has never hired an undocumented worker at all.

In other words, people are going to have to be penalized under this system in order to make it a credible deterrent. You have to be prepared to penalize people who have never hired an undocumented worker at all, but who simply have not gone through this sort of paperwork transaction. That poses a lot of difficult questions, and I hope that those issues will be explored further.

We have also done a substantial amount of work on another aspect of the employer sanctions question, and I have submitted another paper for the record which summarizes our somewhat broader concerns. We have been doing a substantial amount of work over the last few years on the question of regulatory reform and cost-benefit analysis, and the President's Executive order on imposing regulatory analysis requirements on regulatory agencies. In other words, what we began to do is somewhat similar to what Mr. North suggested, and that is to apply the Congress' and administration's own rhetoric to employer sanctions.

I have submitted a paper that raises the question of whether, if the employer sanctions proposals that Congress has before it were a regulatory package proposed, say, by OSHA, it would actually survive the type of analysis which the President wants imposed and which this Congress wants imposed in bills like S. 1080, the regulatory reform bill. We submit that it would not.

When you look at the type of evidence which has been presented, there is a great deal of concern about whether the whole employer sanctions notion is based on anything other than speculation. Earlier this morning we heard administration witnesses say, "Well, it is not clear that it will not work." They have said they were uncertain about what percentage of people would actually be screened out. They have said that it is "arguable" that it might work.

I am certain that if an agency came up with a regulation based on that kind of speculation, that the OMB, or a committee of this Congress if you had legislative veto power, would not allow that agency to adopt that kind of regulatory tactic.

Senator, I will stop. There are a number of other points in my testimony. But I would be happy to answer any questions.

[The prepared statement of Mr. Paker and additional material follow:]

PREPARED STATEMENT OF DOUGLAS L. PARKER

Mr. Chairman, members of the subcommittee, I welcome the opportunity to testify this afternoon concerning the proposals to impose sanctions on American employers who hire undocumented workers. The Institute for Public Representation is a public interest law firm affiliated with Georgetown University Law Center which has recently begun working on questions of immigration law and policy. Historically, our primary concerns have been in other areas, specifically administrative procedure, and regulatory reform, and civil rights advocacy on behalf of minorities, women, and the disabled. We turned our attention to immigration issues when we saw that some of the proposals for changes in the immigration laws, especially employer sanctions, had serious implications for our traditional concerns.

We first focussed our attention on the question of employment discrimination, an area in which we had considerable expertise and experience. We prepared a paper, which I would like to submit for the record, which described the manner in which sanctions would actually encourage employers to discriminate against minorities, particularly Hispanics and Asians. Our conclusion was that a system of employer sanctions could not be effected without creating various incentives and opportunities for employers to discriminate. Under any sort of employer sanctions system, employers would have to be especially cautious about hiring persons who appeared "foreign". Consequently, employers already inclined to discriminate would perceive that the system somehow legitimizes discrimination against persons of foreign ancestry. The existence of sanctions may also provide a defense to some charges of intentional discrimination. Furthermore, not only would an employer sanctions system provide a new pretext for discrimination for those employers already predisposed to excluding minorities from their work forces, but it would also create new business incentives for discrimination. In order to avoid recordkeeping and verification requirements, or to minimize risks associated with unintentional violations, employers may choose to protect themselves by refusing to hire any "foreign looking" job applicant.

We also noted that any sort of employer sanctions system would impose disproportionate burdens not only on undocumented workers but also on minority citizens seeking government authorization to work. For example, such a system would place additional barriers in the path of minority youth seeking employment, thereby contravening the system's alleged goal of reducing job displacement. Finally, such a system would afford government officials considerable discretion in deciding who is authorized to work. It can reasonably be assumed therefore that more stringent scrutiny would be applied by those officials to minority citizens and legal aliens.

While our discussion of potential employment discrimination focussed primarily on the impact on Hispanics and Asians, it is clear that the adoption of employer sanctions will have serious ramifications for other minorities, women, and the disabled. For the past 15 years, the government has attempted to eliminate employment discrimination, and to prevent employers from asking questions which do not relate to a person's ability to perform a job. It has attempted to prohibit questions about an applicant's race, marital status, sexual preference, or disability. Now, however, an employer sanctions program would require employers to make exactly such an inquiry; indeed, it would be illegal not to discriminate among job applicants. If employers are required to look closely at each person's nationality and other aspects of his or her personal history, rather than only at that person's ability to peform a job, a climate of suspicion and distrust will develop. In my view, that will affect all persons who have historically been subject to employment discrimination.

After considering the potential for employment discrimination created by the sanctions proposals, we began to ask another question: even if discrimination could not be prevented, would its significance be outweighed by the positive results of a sanctions proposal? In other words, it seemed necessary to ask if the identifiable benefits of employer sanctions actually outweighed the significant risks of both social and financial costs. Such a question is especially appropriate at this time because of the emphasis, in both the Administration and the Congress, on cost/benefit analysis as a tool of government decision-making. This subcommittee should ask whether the employer sanctions proposals would survive the sort of analysis that is required under either Executive Order 12291 or the regulatory reform legislation under consideration by the Judiciary and Government Affairs Committees. I submit that it would not. We have prepared a short paper, which I will provide to the Committee, which applies the standards and procedures of Executive Order 12291 to the information available on the costs and benefits of sanctions. Frankly, the proposal would not hold up well under the scrutiny of OMB. On the contrary, because it involves such certain social and financial costs, yet is based on such speculation as to its potential effectiveness, and on such unclear perceptions of its goals, an employer sanctions regulation would be a prime candidate for OMB's regulatory "hit list".

It would also be a prime candidate for a legislative veto. It seems to me to be based on exactly the sort of decision-making which the Congress has condemned at regulatory agencies. For example, would this Congress allow OSHA to adopt a rule requiring employers to provide respirators for workers in chemical plants, where OSHA 1) recognized that the respirators would be expensive and inconvenient, 2) did not clearly state what specific injury the respirators were intended to protect against, 3) admitted that it was not certain the respirators would actually work, but claimed 4) they were necessary to create an "image of control" over the problem of hazards in the workplace? If an administrative agency should not be allowed to adopt rules that impose new burdens on the economy and citizens unless it has carefully determined that the potential benefits outweigh the potential costs, the Congress should not adopt a scheme such as employer sanctions unless it is convinced that its decision is based on complete information and a careful analysis of all the inherent risks and results.

In my view, no such analysis has yet been completed. The participants in the debate are simply speculating about possible results. While the agreed purpose of an employer sanctions program is to restrict job opportunities for illegal aliens, there is little agreement on what the effects of such a restriction will be. One beneficial effect of such a restriction, it is argued, would be to alleviate the burden on social services allegedly caused by undocumented workers. However, it is not clear that employer sanctions will have this effect since studies have indicated that the federal, state and local tax contributions of undocumented workers adequately offset their relative share of social service resources. A second alleged effect of employer sanctions would be to reduce job displacement and depression of wages and working conditions. However, economists specializing in this area continue to disagree regarding the extent to which illegal immigration causes job displacement of native or resident workers or wage depression. It is not clear what proportion of the undocumented population works under conditions and wages competitive with legal workers. In fact, studies have indicated that most aliens work at or near the bottom of the labor market in jobs that most Americans do not want - in jobs that offer the least in economic rewards, social status, job security and opportunity for advancement.

Even more fundamentally, there is no agreement over whether penalizing employers for hiring undocumented workers will actually deter illegal immigration at all. In other words, even if we assume that illegal immigration has adverse effects in this country, and even if we assume that jobs are one of the primary reasons for illegal immigration, we cannot simply conclude that employer sanctions will prevent people from coming to the United States. That critical conclusion would have to be based on a series of further assumptions:

> (1) It must be assumed (a) that employers will comply voluntarily and refuse to hire undocumented workers, or (b) that the law will be so vigorously enforced that employers will refuse to hire undocumented workers out of a fear of prosecution.
>
> (2) It must be assumed that workers in foreign countries will know that jobs have become more difficult to obtain in the United States, and that they will decide that they are likely to be better off if they stay in their own countries.

On the present record, none of these assumptions appears to be warranted. Why, for example, would employers who benefit from a low-paid undocumented work force comply voluntarily? Some of those employers apparently reap substantial economic benefits from their exploitation of undocumented workers. Since they already are violating minimum wage laws, they would have little additional incentive to avoid a further fine for violating the employer sanctions law. Even those employers of undocumenteds who are not paying illegally low wages may benefit from the reliability and industry of their illegal employees, and decide that fines would best be internalized as a business cost. In fact, it would most likely be less expensive to absorb the costs of civil fines than to comply with the law in the first place.

The likelihood of significant voluntary compliance is reduced further by the problems of enforcement of any employer sanctions law. The failure to examine these problems is one of the most serious oversights in the debate over sanctions. The questions about enforcement procedures continue to multiply as the proposals are examined in more detail and as the administration releases more information about its program. For example, who will actually be responsible for enforcement? The Immigration and Naturalization Service? The Department of Labor? How much additional staff will be required? What will be the costs of training, travel and support equipment? None of these issues have been addressed.

Not only has there been a failure to consider who would be responsible for enforcement, there has been an equally serious failure to consider how enforcement would actually be carried out. What records would an employer have to maintain? Would an employer be subject to penalties for not maintaining records, even if he or she has never actually hired an undocumented worker? Under the Administration's proposal, for example, only those employers who actually hire undocumented workers would be penalized -- there would be no separate penalty for failure to keep records. Even if there were, is it rational to assume that any enforcement resources would be spent on employers who do not actually hire undocumented workers, but who only fail to complete part of the necessary paperwork? The resources of INS and the rest of the Department of Justice are very limited. It is therefore inevitable that, because prosecution will be highly selective, many employers will never have to worry about compliance.

In addition to these practical impediments, additional legal questions regarding enforcement of sanctions also arise. For example, if effective enforcement depends on inspection of employer records, what sort of warrant would be necessary before an inspection can occur? Certainly, employers will not consent to searches, since they would be exposing themselves, and not just their employees, to prosecution. Another significant legal question which arises concerns the standard of liability. Most proposals would only penalize those employers who "knowingly" hire undocumented workers. How will "knowingly" be defined? How will such a standard be applied in practice? Will proof be so difficult that enforcement will require extensive trials or some other sort of evidentiary hearing in every case? If so, enforcement will become so time-consuming and complicated that it will be impossible to prosecute most employers who violate the law. Moreover, those who are prosecuted will have a good chance of avoiding liability. If that occurs, employers will soon realize that the sanctions are a sham, and that they can safely refuse to take them seriously.

All of these potential problems with enforcement lead me to question whether employer sanctions can be an effective device for deterring illegal immigration. Many employers will perceive that the chances of prosecution are small, and that the chances of any substantial penalty being imposed are even smaller. They will therefore continue to offer at least some jobs to persons who may be undocumented workers. Those jobs would continue to be available, as would jobs offered by small employers who would apparently be exempted altogether from the sanctions law. Given that kind of "leakage" in the system, I am concerned that the law will not convince persons who are starving in other countries that there are no economic advantages in coming to the United

States. It seems logical to me that unless a person contemplating coming here knows there is virtually no chance for a job, employer sanctions will have only a limited effect. Even though jobs are already difficult to obtain, illegal immigrants still come to the United States, to seek the jobs that may be available and for many other reasons, such as family or cultural ties. We simply don't know for sure what the perceptions of potential immigrants are and how they calculate the potential risks and benefits of coming here. Nor do we know what level of enforcement will be necessary to make a sanctions law a credible deterrent.

It is my position that no employer sanctions law should be enacted until these questions are answered and more complete information and analysis is obtained. One of the aspects of the entire employer sanctions debate which troubles me most is the argument that we have to do something dramatic and highly visible to try to gain control over illegal immigration, even if we are not sure whether it will work or not. The Administration has admitted that sanctions will probably not be very effective, but has claimed that the adoption of a sanctions proposal will create a needed "image of control." This is a very dangerous way to approach a question of this significance. Sanctions carry with them the possibility of immense social and financial costs. They also carry with them the risk that employers and employees will soon recognize that the entire program is really nothing more than a facade. The staff of the Select Commission argued for increased enforcement of immigration laws at least partly on the grounds that it undermines the value of and respect for all laws if immigration laws can simply be ignored. I agree with that assessment. I fear that adding an employer sanctions law which cannot be enforced will increase disrespect and contempt for our legal system. That is a high price to pay for a program that may have no effect on the problems it is intended to solve. I therefore urge the committee to act cautiously, to resist those who demand easy solutions and dramatic gestures, to recognize that it does not have adequate evidence before it to support sanctions proposals, and to apply the same high standards to this decision that it would require of other agencies of the government.

COST-BENEFIT ANALYSIS OF PRESIDENT REAGAN'S EMPLOYER SANCTIONS PROPOSAL

The Administration's Proposal

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On July 30, 1981, Attorney General William French Smith proposed the Administration's new immigration package to a joint hearing of Senate and House immigration subcommittees. As part of the package, the Attorney General announced the Administration's proposal to impose sanctions on employers who knowingly hire illegal aliens. To implement this proposal, the President recommends legislation which would impose civil fines ($500 to $1,000) for each employer offense of hiring illegal aliens. In addition, the President intends to authorize the Justice Department to seek injunctions against employers who follow a "pattern or practice" of hiring illegal aliens.

The employer would have a good faith defense under the proposed new law if he requests from the prospective employee and examines:

1) documentation issued by the Immigration and Naturalization Service, or

2) any two of the following:

    (a) social security card
    (b) driver's license
    (c) registration certificate issued by the selective service system
    (d) birth certificate
    (e) sworn statement of lawful U.S. residence
    (f) any other evidence of lawful U.S. status.

In addition, the new hire and the employer must sign a form certifying that the new hire is entitled to lawful residence in the U.S., and that the employer inspected two of the above identifiers and has no reason to believe the employee is not entitled to lawful residence.

Need For Cost-Benefit Study

A serious shortcoming of the Administration's proposal is that it fails even to mention the costs and benefits associated with the employer sanctions program. This failure is inexcuseable given the Reagan Administration's proclaimed focus on cost-effective government action. Less than a month after his inauguration, on February 17, 1981, the President issued Executive Order 12291 requiring agencies and the OMB to determine the most cost-effective approach for meeting any regulatory objective. While the executive order does not technically apply to proposed legislation, such as the Administration's immigration package, it does reflect the long-promised commitment by the Administration to ensure that unnecessary and ineffective government action is minimized. In light of this, a program as far-reaching as the Administration proposal should not be implemented unless and until a thorough cost-benefit analysis of all the available alternatives shows the employer sanctions program to be the most cost-effective solution to the problems which allegedly arise from illegal immigration.

Major Requirements of E.O. 12291

Executive Order 12291 requires all executive agencies to prepare a cost-benefit analysis or "regulatory impact analysis" (RIA) before proposing any major rules. In preparing an RIA, an agency must adhere to President Reagan's regulatory principles which are set forth in the executive order as follows:

- any regulatory proposal must be based on adequate information concerning the need for and consequences of the proposed action (E.O. 12291, § 2(a));
- the potential benefits to society must outweigh the potential costs of implementing the regulatory action (E.O. 12291, § 2(b)); and

- an agency must examine alternative approaches and must choose the course of action that minimizes the net cost to society (E.O. 12291, § 2(d)).

OMB recently issued interim guidelines,[1] pursuant to section 6 of the executive order, to provide agencies with direction in preparing their RIA's. The OMB guidelines state that all preliminary and final RIA's of major rules should contain five elements:

1. A statement of the need for and consequences of the proposed rule
2. An examination of alternative approaches to achieving the regulatory goal;
3. An analysis of the expected benefits and costs of the proposal, quantified to the extent possible;
4. An explanation of the reasons for choosing the proposed regulation rather than the alternatives; and
5. A statement of the statutory authority supporting the agency's proposed regulatory action.

This paper will apply the principles of Executive Order 12291 and the OMB guidelines to the information currently released on the employer sanctions program. It will show that the President's proposal does not meet the executive order's requirements for demonstrated cost-effectiveness. It is clear that if the employer sanctions proposal were a regulation proposed by a federal agency, it would not survive the scrutiny mandated by the President's own procedures.

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[1] Interim Regulatory Impact Analysis Guidance, prepared by the Office of Management and Budget (1981).

The Administration's Employer Sanctions Program

(1) Statement of need for and consequences of the employer sanctions program.

The OMB's June 13 Guidelines require each agency to state "precisely what the problem is that needs to be corrected," and to articulate how a proposal will meet its regulatory objectives. The Administration fails to identify "the problem" associated with undocumented immigration which would explain the need for an employer sanctions program. In a recent July 1981 statement, President Reagan merely listed a series of problems which may be associated with undocumented immigration, such as the strain on community services, potential job displacement, wage depression, the increased influx of unauthorized entrants and the inability of the Immigration and Naturalization Service to enforce the law.

However, none of the analysis on illegal immigration by the Selection Commission or the President's own Task Force on Immigration and Refugee Policy provides any accurate information on the extent to which illegal workers actually displace legal workers, or the extent to which the availability of illegal workers leads to lower wages and poorer working conditions for the entire labor force. Also unknown is whether these adverse economic effects are offset by other economic benefits from the presence of those workers, such as increased productivity. While the Administration has announced some general reasons why it wishes to curb illegal immigration, the need for the program is not documented by the "adequate information" required by § 2(a) of the executive order. The Government cannot possibly assess the necessity of the employer sanctions program without a clear understanding of the problem the program addresses.

The Administration also fails to examine the consequences of the employer sanctions program and makes no showing tht the program will accomplish its intended purpose. No information clearly indicates that employer sanctions are the most effective way to stem the flow of unauthorized entrants, to dry up employment opportunities for illegal aliens, to reduce displacement of American workers, or to raise working condition standards.

(i) Inhibiting the flow of immigrants

Even if an employer sanctions program does limit an illegal alien's access to employment, job opportunity is only one of many factors which contribute to the flow of migrants. Other factors include economic or political hardships in the source country, cultural and family ties in America, ease of access, legally or illegally, into the United States, and the perception that the superior opportunities and standard of living in the U.S. merit a serious attempt to overcome the obstacles of finding a job and starting a new life in America. Therefore, even if employer sanctions are effective in inhibiting job opportunities, they may nevertheless only marginally inhibit the migrant flow itself. If this is the case, the United States would be faced with a large undocumented population, lacking economic self-sufficiency, which would impose social costs on the public and would increase the labor force available to an underground economy.

(ii) Discriminatory consequences of the program

Another consequence the Administration has totally overlooked is that an employer sanctions program cannot be implemented without discriminatory impacts upon Hispanic, Asian, black, and other minority American and legally resident aliens. These individuals would be subjected to discrimination inherent in the administration of the program, discrimination by employers implementing the program, and discrimination by Government officials enforcing the program. The Administration has not even considered these adverse consequences let alone balance such negative consequences against the benefits of the proposal as required by § 2(b) and

§ 3(d)(2) of the Executive Order. This paper examines the adverse effects of employer sanctions more fully below where the costs of the proposal are discussed in detail.

(2) An examination of alternative approaches

The Administration proposed the employer sanctions program without any meaningful consideration of alternative approaches. The only mention of alternatives was in the July 31, 1981 testimony of Attorney General Smith before the joint House and Senate subcommittees on immigration. The Attorney General simply stated that we cannot depend solely upon border interception and that efforts to deport illegal aliens in the interior is a costly and, at best, partial solution. In a conclusory fashion, the Attorney General said, "the only credible enforcement measure remaining is a prohibition on hiring illegal aliens."[2]

This hardly constitutes the careful weighing of alternatives envisioned in Executive Order 12291 or in the OMB guidelines. The executive order requires all agencies to consider alternative approaches to the regulatory objective and to choose the alternative involving the least net cost to society.[3] OMB interim guidelines instruct an agency to consider the consequences of having no regulation, the major alternatives both within and outside the jurisdiction of the issuing agency, and the alternative market-oriented ways of achieving the proposal's objective.[4]

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[2] Testimony of Attorney General William French Smith before the Senate Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration, Refugees, and International Law (July 30, 1981).

[3] E.O. 12291, 46 Fed. Reg. 13193, § 2(d) (1981).

[4] Interim Regulatory Impact Analysis Guidance, Prepared by the Office of Management and Budget (1981).

The consequences of not having an employer sanctions program at all was not considered by the Administration. However, this option could involve the least net cost to society. The employer sanctions program is only one component of a five-part comprehensive immigration policy proposed by the Administration. Since employer sanctions will be difficult to enforce effectively and may not significantly deter illegal migration, the Administration should have considered whether the other components of its proposed immigration policy would be sufficient to deal with the problem of illegal immigration. These other proposals are: (1) increased enforcement of existing immigration and fair labor standards laws; (2) a new experimental temporary worker program; (3) legal status for qualifying illegal aliens currently residing in the United States; and (4) international cooperation within the western hemisphere to enforce immigration laws and discourage illegal migration.[5] Rather than assessing the potential impact of each component of its proposal, the Administration simply combined them together, apparently hoping they would add up to what could be labelled a comprehensive policy.

The first and fourth elements of the Administration's immigration policy, involving increased domestic and international law enforcement, are particularly worthy of further exploration.[6] In fact, these two programs operating together might deter enough illegal migrants to adequately meet the Administration's immigration objectives. The first element involves enhancement of existing legal authorities to provide more effective policing of the border and expanded monitoring of minimum working conditions. Increased border enforcement, however, must be accompanied by training programs for INS officials and safeguards to diminish the instances of civil rights violations against legal residents. Otherwise, increased border enforcement could lead to a militarization of the border and violations of the civil rights of Hispanics living in the border area. The best targeted and most effective scheme would concentrate on apprehending and prosecuting "coyotes", or smugglers of unauthorized entrants. In view of the limited resources available and the length of our land borders, this scheme would represent a systematic and focused attack on our immigration problem.

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[5] Testimony of William French Smith, Attorney General, before the Senate Subcommittee on Immigration and Refugee Policy and House Subcommittee on Immigration, Refugees, and International Law, (July 30, 1981).

[6] The second and third elements of the program, involving the guest worker program and a long-term legalization procedure, do not appear to offer an effective deterrent to future unlawful immigration. Further, the particular programs proposed by the Administration seem to be fraught with serious problems and have met wide opposition.

Expanded enforcement of such laws as the Fair Labor Standards Act and the Occupational Safety and Health Act, which monitor the conditions under which all workers must work, is likely to deter the hiring of illegal aliens in a less discriminatory way than the employer sanctions program. To the extent that an employer's ability to exploit his workers perpetuates the existence of a marginal economy which attracts unauthorized entrants, policing employer behavior with respect to working conditions, wages, and hours will inhibit this "pull" factor.

The fourth program proposed by the Administration is international enforcement of immigration laws. While the Administration's focus on international enforcement is important, this approach does not address the causes of illegal immigration. An enforcement approach, in effect, builds fences to prevent illegal aliens from crossing a border. A cause-oriented alternative would alter the conditions in the source country which compel individuals to migrate in the first place. Since the causes of illegal immigration are international in scope, they require international solutions. A focus on labor-intensive development aid and investment policies is one such international alternative that the Reagan Administration failed to consider. Unlike the employer sanctions program which emphasizes national self-preservation and inhibits the economic relief that source countries derive from migration, a precisely targeted aid and investment policy would both reduce the incentive to migrate and make the lack of such migration economically tolerable. Such a policy would contribute to the stability of our neighbors and other source countries, whereas merely choking off migration might increase their instability. Labor-intensive development aid and investment also promise to be a more thorough and permanent amelioration of the total complex which produces large-scale unauthorized migration.

In light of the significant doubts that still surround the employer sanctions proposal, the Administration should have carefully considered alternatives to arrive at an effective and well-targeted response to the immigration problem. The option of implementing an immigration policy that did not contain employer sanctions should have been considered in view of the uncertainty about the need for and effectiveness of employer sanctions as well as the extensive costs involved in implementing such a scheme. The Administration, however, gave no indication of considering this or any other alternative.

(3) Analysis of benefits and costs

(a) cost estimates:

Executive Order 12291 requires a regulatory impact analysis to describe the potential costs of a proposal, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the cost.[7] The employer sanctions program will impose substantial financial and social costs upon Government, employers, job applicants, and the general public. Unless the Administration estimates the following costs with exactitude or with reliable methods of projection, it will be impossible to determine the cost-effectiveness of the employer sanctions program.

A. Financial Costs

1. Financial costs to the government

a. initial start-up costs

(1) planning the detailed implementation of the program

(2) selecting and training the staff to direct, implement, and enforce the program

(3) purchasing necessary office supplies, furniture, and equipment

(4) arranging for necessary office space

(5) preparing, printing, and distributing necessary information and forms to employers

(6) implementing publicity campaign to inform employers and potential applicants of the program

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[7] E.O. 12991, 46 Fed. Reg. 13193, § 3(d)(2)(1981).

b. annual implementation costs

(1) salaries for the administrative staff
    to oversee and implement program

(2) office overhead costs

(3) salaries for increased staff to issue the necessary
    documents at
    - (a) Health and Human Services (social security card)
    - (b) Immigration and Naturalization Service
      (naturalization or legal resident papers)
    - (c) Vital Statistics Offices throughout the country
      (birth certificate)
    - (d) Motor Vehicle offices throughout the country
      (driver licenses)

(4) costs of publicity campaign to inform employers
    and applicants of program procedure and consequences

c. annual enforcement costs

(1) salaries for increased law enforcement staff
    - (a) INS inspection officers
    - (b) support staff

(2) office overhead costs

(3) costs of training staff

(4) costs of inspecting for forged documents and
    costs of informing employers on how to check
    for potential forgery

(5) costs of on-site inspection

(6) costs of prosecuting employers in violation
    of the program

(7) costs of establishing and operating administrative courts to determine violations and enforce the fines

(8) costs of administering judicial courts to hear appeals and challenges to the employer sanctions program

(9) record-keeping costs

Note: since the employer sanctions program is unprecedented in nature, there is total uncertainty about the enforcement cost. However, one can safely say that the more effective the enforcement mechanism the greater will be the cost.

(2) Financial costs to employers

a. time costs encountered for each new hire

(OMB believes business will be encumbered by vast amounts of paperwork because a small minority hire illegal aliens. Estimating that the new system would require 30 additional minutes for each new hire, OMB states that the burden on employers would be at least 7.5 million hours per year.[8])

b. record-keeping costs

c. reporting costs

d. cost of undergoing inspection

e. costs of self-monitoring

(3) Financial cost to the public

a. subsidizing cost of employer sanctions program through taxation

b. cost of program may be internalized by employers as a business expense to be passed onto the consumer in the form of higher prices or to the worker in the form of lower wages

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[8] "Immigration Issues", Memorandum for the Cabinet by Craig L. Fuller, director of the Office of Cabinet Administration (1981).

B. Social Costs

1. Adverse effects on civil rights

(a) Discrimination in the administration of the program

The employer sanctions program cannot be administered without discriminating against minority American and legally resident aliens. Under the proposed program, only workers seeking new jobs or changing jobs would be required to submit two identifying documents and a signed certifying form. The program's administrative burden would fall disproportionately on minority citizens and "foreign looking" legal residents since they are exposed to employment discrimination and find it most difficult to get stable jobs.[9] Moreover, many low income, marginally employed persons, particularly minority youth will not have generated the records required for work authorization. The failure to support an affidavit with two valid documents will result in a complete denial of a job or, at least, a delayed determination of employment eligibility.

(b) Discrimination by employers against minority citizens and legal aliens

The employer sanctions program could discriminate in an additional way. After an employer inspects two of the specified documents, the employer must sign a form certifying that he has no "reason to believe" the employee is not entitled to lawful residence. An applicant's inability to speak English, his foreign appearance, his accent or his surname may cause an employer to believe an applicant falsified his identity on the two documents. An employer may deny an applicant a job fearing that he will be held liable for employer sanctions in situations in which the courts believe a reasonable man would have known the applicant was an undocumented alien. These employers will perceive that the safest way to avoid sanctions is by not hiring anyone who could turn out to be an undocumented worker, i.e., any "foreign-looking" job applicant. Employers already disposed to discriminate against "foreign-looking" persons will perceive that the new law not only legitimizes this behavior, but actively encourages it.[10]

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[9] See Equal Employment Opportunity Commission, Equal Employment Opportunity Report: Job Patterns for Minorities and Women in Private Industry, p. xvii (1975).

(c) Discrimination by law enforcement officials

The only feasible method of enforcing the new law would be periodic spot checks of businesses, involving on site comparisons of business records and employee documents. Since the purpose of the employer sanctions program is to deter the hiring of aliens who have illegally entered the United States, investigating officers will focus their efforts on checking the authorization status of workers suspected of being deportable aliens. Current INS practices, as documented by the United States Commission on Civil Rights, suggest that workers likely to be considered undocumented would almost exclusively be Hispanics, Asians, and blacks.[11] Only employees with certain racial characteristics would be subjected to humiliating work status checks during INS enforcement visits.

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[10] V. Briggs, The Quest for an Enforceable Immigration Policy, Employment and Training p. 393 (Fall, 1979)(one result of an employer sanctions program would be to put the "moral weight" of the law against the employment of certain types of persons).

Even if INS were to conduct checks in a random fashion rather than targeting foreign-looking workers, any problems in ascertaining work status may be resolved in a discriminatory manner. For example, if a Hispanic or Asian worker forgets his documentation and cannot prove his American citizenship, he may be presumed by INS officials to be an undocumented worker.

In sum, the employer sanctions program presents very real dangers to equal employment opportunity and to civil rights and liberties.

2. Decreased mobility of labor

For both employers and employees, an employer sanctions system will introduce new burdens on the formation of the employment contract. These burdens will inhibit the mobility of labor, especially if minority persons view the hiring process as part of a system which subjects them to special scrutiny because of their appearance.

3. Autonomy of Employers

The Administration's employer sanctions program not only imposes regulatory costs on an employer in pursuit of an uncertain economic "benefit." It also interferes with fundamental business decisions about how, whom and when to hire. The employer sanctions proposal substitutes abstract regulatory considerations in the hiring decision for more knowledgeable and business-related considerations and must be carefully scrutinized. This particular scheme is a novel imposition on businessmen, unprecedented in scope, and quite unlike the strictures on business autonomy which are now widely accepted.

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[11] Report of the U.S. Commission on Civil Rights, _The Tarnished Golden Door, Civil Rights Issues in Immigration_, 85 (1980).

4. Autonomy of Employees

The Administration fails to consider the implications of the employer sanctions program which delegates government enforcement functions to private parties, and which grants employers substantial new powers over those applying for jobs. In this sense, the employer sanctions system will institutionalize pre-employment inquiries into non-job-related factors, and thus reverse a decade of efforts to eradicate such inquiries from hiring decisions.

5. Social Order and Community Health

If employer sanctions do not succeed in deterring virtually all illegal immigration, they will result in the creation of a jobless population of alien persons, excluded from society and economic opportunity. The Administration has not considered the potential economic and social costs of such a result.

(b) Benefit estimates

As discussed above, the employer sanctions program will impose significant financial and social costs on society. Unless the potential benefits of the proposed program actually outweigh the potential costs to society, the employer sanctions program will not comply with the Administration's own cost-effectiveness standards as outlined in Executive Order 12291. The basic argument in favor of sanctions is not an economic one. As mentioned earlier, the President's Task Force on Immigration and Refugee Policy has not identified the economic costs involved in hiring undocumented workers or the extent to which an employer sanctions program will alleviate these costs. The Administration has offered no information on how many illegal workers actually displace legal workers, or to what degree the availability of illegal workers leads to lower wages and poorer working conditions for the entire labor force.

The main benefit the Administration offers to support its employer sanctions program is an abstract one - that it will somehow protect American "sovereignty". As Attorney General Smith put it, "a great country should be able to enforce its borders.[12]

However, we do not know if employer sanctions would actually be effective in keeping undocumented workers out of the country. It is already illegal for undocumented aliens to work here, but that has not deterred those whom come. If a person is fleeing real poverty or political oppression, or wishes to join family already here, the potential diffficulty in finding a job is unlikely to deter him. In addition, the high standard of life in America and our political stability will continue to serve as a magnet, drawing people from their homelands.

Nor can we estimate the benefit of sanctions without resolving difficult issues about how the new law would actually be enforced against American employers. It seems unlikely that employers will comply voluntarily, especially because many of them rely on undocumented workers as part of their work force. Since employers can protect themselves from liability by examining two pieces of documentation such as a driver's license and a birth certificate, it is unclear whether forged documents will undermine the effectiveness of the system. Certainly no government agency can monitor every job offer, unless we are ready to accept the idea of a computerized super-bureaucracy cross-checking the documentation and legal status of each person who applies for work. Even if violations are suspected, the enforcement agencies, such as the Justice Department and the Immigration and Naturalization Service are already overburdened and are unlikely to devote resources to the investigation and prosecution of employers. In short, there is great uncertainty in estimating the benefits of employer sanctions, because there is great uncertainty if the sanctions will even work.

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[12] Memorandum for the President, subject: "Report of the Task Force on Immigration and Refugee Policy, prepared by Attorney General William French Smith (June 26, 1981).

The Reagan administration itself recognizes the practical limitations on the effectiveness of any sanctions proposal. A high level document submitted to cabinet members considering the employer sanctions system stated, "[w]hile even the most elaborate such system is unlikely to stop illegal immigration, a modest system will likely make such immigration somewhat more difficult, and along with an appropriate enforcement strategy, restore an image of control."[13] The decision to recommend employer sanctions to create an "image of control", therefore, seems based on the need to do something even if there is little chance of the proposal having any real effect.

When this intangible and elusive "benefit" is computed into President Reagan's cost-benefit formula outlined in Executive Order 12291, the employer sanctions program does not survive the required scrutiny. The

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13 "Immigration Issues," Memorandum for the Cabinet, prepared by Craig L. Fuller, Director of the Office of Cabinet Administration (July 10, 1981).

executive order states that an "action shall not be undertaken unless the potential benefits to society... outweigh the potential costs to society."[14] The Reagan Administration's employer sanctions proposal simply cannot withstand this cost-benefit comparison. On the one hand, the program involves overwhelming financial costs to the government in implementing and enforcing the sanctions and to the employer in complying with the program, as well as substantial social cost to the public, such as adverse effects on civil liberties, decreased mobility of labor, interference with employer/employee autonomy, and dangers posed to social order and community health. On the other hand, the benefits of the proposal are speculative at best. There is simply no factual data to support the conclusion that an employer sanctions program will be feasible, or that it will be effective in deterring illegal immigration. In sum, there is no indication that the program will be cost-effective using President Reagan's own cost-benefit standards.

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[14] E.O. 12291, 46 Fed. Reg. 13193, § 2(b)(1981).

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DISCRIMINATORY EFFECTS OF EMPLOYER SANCTIONS PROGRAMS UNDER CONSIDERATION BY THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY

This paper presents an analysis by the Institute for Public Representation ("IPR") of proposals for the imposition of sanctions against employers hiring undocumented alien workers. The analysis focuses on the discriminatory effects of alternative schemes for employer sanctions combined with systems for uniform verification of worker status.

IPR is a public interest law firm affiliated with Georgetown University Law Center. One of IPR's chief objectives is the prevention of employment discrimination based on race and national origin.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

Employer sanctions proposals which are not combined with safeguards against racial discrimination are widely regarded as unworthy of serious consideration. All observers recognize that a law simply making it illegal for an employer to hire persons suspected of being undocumented aliens would cause a massive increase in employment discrimination. A person who "appeared foreign", whether he was a citizen, a resident alien, or an undocumented worker, would be subjected to special scrutiny and other discriminatory burdens when seeking employment. Such a result is patently unacceptable in a society committed to stamping out racial discrimination in the hiring and promotion of workers. Accordingly, the sanctions schemes receiving careful attention by the Commission contain some method for uniform verification of worker status. Proponents of these various schemes assume that because the programs would involve objective verification and recordkeeping responsibilities for employers, they would not operate in a discriminatory manner.

IPR undertook this analysis in order to test the assumption that the various "objective verification" schemes under review would eliminate the potential for discrimination in the employer sanctions proposals. As explained in detail herein, we have determined that this assumption is untenable. While the opportunities and incentives for discrimination that would be created by the proposed "objective" schemes would be less obvious than those created by a "subjective" verification program, they would be no less real or significant.

Our analysis indicates that each of the proposed programs would substantially increase employment and law enforcement discrimination against Hispanic Americans, Asian Americans, black Americans, other minority citizens and legal aliens. The proposed schemes would cause employment discrimination on two distinct levels. First, the programs are designed so as to make it disproportionately burdensome for minority citizens to obtain government permission to work. The administrative burdens imposed on employees by each of the programs would fall almost exclusively on marginal workers with transitional work status. In contravention of their stated purposes, the programs would place more barriers in the path of minority youth seeking employment. In addition the administrative procedures that would be employed by the programs to ascertain work authorization status would be extremely discriminatory. Each of the schemes would accord government officials extensive discretion to decide who is authorized to work. These officials will inevitably apply a far more stringent test to Hispanics, Asians and other persons of foreign ancestry.

On an independent level, the sanctions programs would increase employment discrimination by creating various incentives and opportunities for employers to discriminate. Any highly publicized sanctions scheme would foster employer attitudes that are conducive to discriminatory hiring practices. Employers already inclined to discriminate will perceive that discrimination against persons of foreign ancestry is somehow legitimized by the program. Other employers may feel it is their civic duty to go beyond the minimum requirements of the sanctions program and make their own subjective assessments of a job applicant's work authorization status.

Moreover, the proposed programs would encourage many employers to discriminate by furnishing an apparently legitimate but actually pretextual basis for discrimination based on race and national origin. Employers would be delegated the authority to match the characteristics of prospective employees with information furnished by the government. An employer who is in fact discriminating could insulate himself from a civil rights action by claiming that he was not satisfied that a particular applicant conformed to the government's description.

The proposed programs would also increase employment discrimination by creating business incentives for employers to discriminate. In order to avoid burdensome recordkeeping and verification obligations or to minimize risks associated with accidental violations, employers will "play it safe" by refusing to hire any foreign-looking persons. In addition, many employers will realize it makes good business sense to ignore job applicants who may have their employment applications delayed by the government pending an investigation of their work authorization status. In order to prevent disruption of hiring procedures, these employers will only consider applications which they perceive will be regularly cleared by the government.

Finally, the proposed programs will cause employers to discriminate by rendering existing civil remedies less effective. Since claims of employment discrimination against Hispanics, Asians and other persons of foreign ancestry will substantially increase, the already backlogged EEOC will be capable of handling fewer cases alleging employment discrimination against blacks and other minorities.

Each of the sanctions programs under review will also cause law enforcement discrimination. When INS agents conduct spot checks of businesses or raid factories suspected of noncompliance, they will check the work authorization status of foreign-appearing persons far more frequently than they check the status of white employees. This discriminatory enforcement strategy will have additional undesirable consequences. For example, employers will be disinclined to hire, promote or train persons who may be subjected to disruptive and time-consuming status checks.

In addition to encouraging discriminatory enforcement tactics by INS agents, the programs would separately increase the incidence of discriminatory law enforcement abuses by local police officers. The programs would create strong incentives for local police to regularly stop Hispanics and other minorities and demand proof of their work authorization status. As a result of the programs, American citizens of foreign ancestry, even though not suspected of committing any crimes at all, would be exposed to repeated harrassment at the hands of local police.

Since the programs under consideration would increase employment and law enforcement discrimination they would be legally unacceptable. By causing a disparate impact on and treatment of citizens and legal aliens of particular races and national origins, the proposed schemes could be successfully challenged on both statutory and constitutional grounds. Moreover, by allocating excessive authority to private employers to decide who is legally permitted to work, the programs would be subject to challenge as violations of due process.

Because the sanctions programs would substantially increase discrimination and may be found to be legally invalid, the Select Commission should recommend against adoption of these programs. The advisability of rejecting these schemes is even clearer in light of other decision-making considerations. Of primary importance, there is at present no conclusive evidence that employer sanctions programs would be effective in achieving their objectives. There is considerable debate over whether undocumented aliens displace American workers or depress working conditions in the United States. In addition, it is uncertain whether the programs proposed would be successful in preventing more than a negligible number of employers from hiring deportable aliens. Finally, there is no guarantee that even a successful "drying up" of job opportunities would deter significant numbers of aliens from illegally immigrating to the United States.

It is IPR's conclusion that employer sanctions proposals of uncertain value and effectiveness should not be recommended when the clear impact of these proposals is significant increases in discrimination and civil liberties violations. As an alternative to the employer sanctions schemes, we suggest that the Select Commission endorse a more carefully tailored and less dangerous approach to the issues which may be raised by the presence of undocumented aliens in the United States. This approach is described in detail in Sections VII and IX below.

II. PROPOSALS UNDER CONSIDERATION

The particular employment sanctions/objective verification schemes under consideration by the Commission and the subject of the present analysis are:

1. Issuance of worker authorization or identification cards

Under this scheme, workers seeking new jobs or falling within certain age brackets would apply for work permits at local Employment Service offices. A worker would nominate two or more data sources to validate his or her application for a work permit, including: (a) filing an income tax return nine years or more before the date of application; (b) withholding of social security taxes in the same time frame; (c) service in the United States armed forces at any time; and (d) employment by the United States government.

Workers found eligible would be issued work authorization cards with their photographs, other identifying data and, perhaps, fingerprints. Workers unable to prove legal status but whose applications appeared "plausible" would be issued temporary permits while various data systems would be searched for proof of legitimate presence in the work force. Workers whose applications did not appear plausible would be referred to the nearest INS office for deportation proceedings. In this system, employers would be delegated the responsibility to check the work cards of job applicants. First, employers would be required to make sure each applicant has a card. Second, the employer would have to match the photograph and other information on the card with the job applicant's actual characteristics in order to determine whether the card belonged to that individual. The employer could not hire any person without a card or whose characteristics did not match those on the card.

Employers would be required to keep detailed records of all "transactions" with workers so that INS could assess compliance with verification obligations.

2. National employability data bank

Under this scheme, workers would apply for work authorization status in similar fashion to the process described above. Workers found eligible would be given a unique work permit number and would have a work permit file constructed for him or her. The work permit file would consist of data from the nominated data sources and identifying information on the individual, such as full name, date and place of birth, full names of both parents and height and weight.

When an individual applied for a job, the employer would call the data bank and provide the job applicant's number, and, in turn, would be provided with two sets of information. First, he would be told either that the number was a valid one for a legitimate worker, or that the number did not exist, in which case the worker could not be hired. Secondly, if the number was valid, identifying data would be supplied to the employer. The employer would be required to compare this data with the worker's actual characteristics. If the information supplied did not accord with the worker's characteristics, the employer would be prohibited from hiring the worker. The computer would provide a unique transaction number to the employer, which would be entered in the employer's records. This number would indicate that the conversation had taken place and the outcome of the transaction.

3. Affidavit-based employer reporting system

In this scheme, employers would be required to keep records containing employee affidavits asserting legal authorization to work in the United States and some form of substantiating documentation. A copy of these employee records would be sent to the government which would screen them, focusing attention on geographical areas and industries where undocumented workers are expected to concentrate. When incomplete or unclear data is submitted, employers would be required to secure additional information and forward it to the government.

When INS received complete employee records it would check these records against its own data files and other data systems. Where INS' follow-up of a specific worker's records indicated a high probability of illegal status, the employer would be required to give the worker a brief period of time to obtain documentation from INS of his legitimacy; if the worker did not do so he would be fired at the end of the time period.

A variation of the affidavit-reporting system which has received particular attention by the Commission staff was proposed by David S. North. */ In this system, all new employees and employers would be required to complete a New Hire Reporting Form. The employer would be obligated to furnish identifying information on himself and, under penalty of perjury, to certify whether or not he assisted the employee in filling out the form. The employee would be required to provide identifying information, to

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*/ See D. North, Employer Sanctions Without a Work Permit: An Exploration of an Alternative.

specify his status in the United States and, under penalty of perjury, to certify entitlement to work in the United States.

The first level of enforcement in this system would relate to the new-hire reporting forms. A geographic sampling system would be devised to determine which forms government officials should review. A rough screening technique would then be employed to select those forms "worthy of further consideration." These forms would be checked against existing INS records to determine the validity of information supplied on the form. In addition, concentrations of scrutinized reports in the file of a single employer would identify that employer for on-site investigation.

The principal enforcement activity would take place in the field by INS investigators. Employers would have the responsibility of maintaining a file of new-hire reports. Investigators would examine the file and ask a "sampling" of workers to identify themselves. One or more instances of new workers who could not be linked with the new-hires reports file would suggest that the employer had failed to file reports and could subject the employer to prosecution.

Another type of investigation conducted by INS under this system would occur on the basis of information developed by the new-hire reporting system indicating a particular employee was undocumented, or INS knowledge that an employer had hired undocumented workers in the past. With this category of employers, all employees hired after a certain date would be interrogated, "matched" against their filed statements and on-site determinations would be made regarding the legitimacy of their status. Those persons determined to be undocumented would be removed for INS processing and the employer's records would be reviewed carefully to determine if he or she failed to report any new hires or colluded in the filing of fraudulent reports. In addition, in North's scheme employers would be subject to prosecution for a pattern and practice of hiring undocumented workers even if such persons had not violated the reporting requirements.

III. IMPACTS OF PROPOSED SANCTIONS SCHEMES ON EMPLOYMENT DISCRIMINATION

Employer sanctions schemes that do not safeguard against racial discrimination are regarded as unworthy of serious consideration in a society committed to stamping out racial bigotry in the hiring and promotion of workers. Accordingly, the fundamental acceptability of the proposed sanctions schemes under review hinges on the assumption that they would not cause discrimination. Proponents of the systems would support this assumption by arguing that the schemes involve simple objective verification responsibilities for employers which furnish little room for an employer's exercise of discretion. Since each employer's obligation is to check the work authorization status of every job applicant or to gather records on all potential employees, the sanctions schemes will not operate in a discriminatory manner.*/

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*/ We note with concern that David North's proposal, summarized above, would directly compel employers to make subjective assessments of worker status. That proposal would subject employers to penalties for engaging in a "pattern and practice" of hiring undocumented aliens, regardless of whether employers comply with all reporting obligations imposed on them. This procedure would clearly create a subjective verification requirement. Employers would be required to refuse to hire persons whom they believe are undocumented workers in order to avoid prosecution. The extraordinary potential for discrimination [footnote continued]

The assumption that the schemes will operate in a non-discriminatory manner is as incorrect as it is superficially appealing. The proposed schemes will generate discrimination against Hispanic-Americans, Asian Americans, other minorities of foreign ancestry and blacks in both the employment and law enforcement contexts. This section will examine how the proposed schemes would furnish numerous opportunities and incentives to government officials and employers to discriminate against minorities and deny them equal employment opportunity.

A. Discrimination in the Administration of the Program

1. Discrimination in the Determination of Work Authorization Status

Under the proposed systems, receiving government authorization to work will be essential for all individuals seeking legal employment in the United States. It is highly unfortunate, then, that the basic administrative structure of the programs would severely discriminate against minority citizens, making it more difficult for them to obtain work authorization status.

[footnote continued from page 11]
against persons of foreign ancestry in such a system is obvious. As noted above, the Select Commission has focused on objective verification schemes precisely because of the general consensus that reliance on an employer's personal assessment of worker status would necessarily involve an unacceptable potential for discrimination. The dangers of such discrimination are not alleviated by attaching the proposal to an affidavit/reporting system; it simply allows a subjective verification system in through the back door. This or any similar effort should be recognized by the Commission for what it is and summarily rejected.

Under the proposed programs, only workers seeking new jobs or changing jobs would be required to obtain government authorization to work. In addition, only these persons would be required to present identification cards to employers for verification, have their status checked by computer or submit affidavits. Thus, the program's administrative burdens would fall squarely on individuals with a highly transitional and fluid work status. Those persons with permanent, stable employment would hardly be affected by the programs. Persons with unstable occupational patterns, in turn, are disproportionately minority citizens. */ Thus, the proposed systems place their heavy administrative burdens primarily on those minority individuals who find it most difficult to get stable jobs and who have historically been exposed to extreme employment discrimination. The systems rely on administrative structures which result in discrimination against individuals already suffering the consequences of past discrimination.

The practical consequences of these administrative burdens on already marginal minority workers would be severe. Many of these workers may drop out of the employment market altogether instead of expending time and energy obtaining government permission to work at tedious and low-paying jobs. Other poor, minority persons, too unsophisticated to comply with the requirements of the proposed systems or wary of contact with the government will, in essence, become illegal workers. Employers will

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*/ See, e.g., Equal Employment Opportunity Commission, Equal Employment Opportunity Report: Job Patterns for Minorities and Women In Private Industry, p. xvii (1975).

benefit from the "black market" in labor that will flourish under the proposed systems by paying these workers even lower wages and providing even worse working conditions than are presently available. Employees who have not achieved legal work authorization status will be unlikely to report Fair Labor Standards Act or Occupational Health and Safety Act violations to the government. Thus, the proposed programs will result in loss of employment for many minority workers and poorer occupational conditions for many more. Even the potential for such occurences should result in the rejection of proposals which have as their ostensible purpose the upgrading of employment opportunities for American workers.

The procedures by which applicants must obtain government authorization to work under the systems will discriminate against minority citizens in another way. As noted above, in the ID card and data bank schemes, individuals seeking work authorization must nominate at least two data sources to document legitimate presence in the United States. Simiarly, in the affidavit-based system, INS will direct employers to fire persons whose affidavits are not supported by valid data sources. While established, economically secure members of society will have no trouble finding themselves in IRS or social security data banks, this will be no easy task for many minority job applicants. It is apparent that low-income, marginally employed persons, particularly minority youth, will often not have generated the records required for work authorization. The failure to support a work permit application of affidavit with valid data sources will result in complete denial of governmental permission to work or, at least, a delayed determination of employment eligibility. Again, the systems would operate so as to hamper the employment prospects of the very persons they are supposed to assist: minority youth with unstable employment histories.

The proposed systems would discriminate in the ascertainment of work authorization status in a third, related way. In the ID card and data bank schemes, workers who cannot nominate 2 data sources but whose applications appear "plausible" will be issued temporary work permits while their work authorization status is analyzed. */ Workers whose applications do not appear 'plausible' will not be issued temporary permits and will be referred to INS for deportation proceedings. It is clear that the decision as to plausibility would be made in a blatantly discriminatory fashion. Applicants whose characteristics do not suggest foreign ancestry will surely have their applications deemed "plausible" by program administrators. These persons will receive temporary government permission to work. On the other hand, Hispanics, Asians and other "foreign-looking" persons without appropriate documentation will invariably have their applications labeled implausible. The American citizens and legal aliens in this group will be denied work authorization status solely on the basis of their race. Therefore, disparate treatment of similarly situated persons in the issuance of work authorization status is built into the administrative structure or the proposed programs. **/

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*/ In the affidavit-based system, a similar standard would most likely be applied by INS officials determining which affidavits are valid.

**/ As a result, the programs could be successfully challenged on equal protection grounds. See p. 53, infra. In addition, the programs could have the anomalous result of exposing employers to suits under Title VII of the Civil Rights Act of 1964 simply for performing verification responsibilities imposed on them. See discussion at p. 46, infra.

Further, even as to those persons who can nominate two data sources, there is also a risk that this same discriminatory "plausible/implausible" standard will be applied as a matter of administrative necessity as a substitute for the objective procedure of checking those data sources. Considering the massive undertaking involved with processing millions of applications for work authorization status or affidavits, a sizable backlog in the determination of work status can be expected to develop. In order to avoid the disastrous systemic and personal economic consequences of delaying issuance of all work authorization permits or review of affidavits for weeks or months, program administrators are likely to circumvent the prescribed process of checking data sources. The most logical means of streamlining the systems would be to adopt the plausible/implausible test at the outset; i.e., to grant temporary or permanent work authorization to all persons whose applications appear plausible at the initial application stage and to defer or deny conferral of work authorization status to all persons whose applications of affidavits appear implausible. In this way the inherently discriminatory standards build into the systems for determining the status of persons unable to offer sufficient documentation of legal presence may become the standards applicable to all persons at the initial stage where they apply for permits or submit affidavits. */

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*/ It should be pointed out that the streamlined, discriminatory processes described above could develop in one of two ways. They could officially be imposed by high-level administrators in response to delays in the processing of applications or affidavits. Perhaps more likely, individual government officials charged with processing applications or affidavits could undermine the officially recognized systems because of pressure to screen huge numbers of affidavits or applications or simply because of the perceived senselessness of preventing "obvious legal" workers from obtaining or keeping employment. Under either scenario, de facto, expedited systems for granting work authorization status or processing affidavits will develop that would function in a highly discriminatory fashion.

It is foreseeable, then, that the systems may operate so that race becomes the overriding criterion in every determination on whether to grant temporary or permanent governmental permission to work. A white, middle-class applicant will surely have his work permit application or affidavit deemed plausible. Since there would be no sense in holding up this individual's application or adding to the backlog to go through the empty ritual of validating his or her application or affidavit, permission to work would be summarily granted. On the other hand, the permit application or affidavit of a poor Hispanic, Asian or other 'foreign-looking' person will be viewed as implausible from the start. Such a person's permit application will at least be subjected to the prescribed documentation requirements (proof of legal presence as substantiated by two data sources) during which time he will be legally barred from obtaining employment. Under the affidavit-based system, such persons will be exposed to INS surveillance from the time they submit affidavits. Thus, the entire brunt of the inevitable backlog in the processing of worker applications or affidavits will fall squarely on persons of foreign ancestry. In addition to the humiliation of being subjected to stricter governmental scrutiny to obtain permission to work, these citizens and legal aliens will be denied ready access to the labor market solely because of their racial characteristics.

2. Discrimination in the Reissuance of Lost Cards

The foregoing discussion suggests another way in which the administration of the identification card system will discriminate against foreign-looking persons. It can be expected that many people will lose or accidentally destroy their work authorization cards. The process for reissuing lost cards will invariably function in a discriminatory way. Persons without characteristics indicating foreign ancestry who claim loss of their cards will at least be granted temporary replacement cards while their data records are analyzed. Hispanic-Americans claiming loss of ID cards are not likely to be so treated; their applications for reissuance will be viewed skeptically until their authorization to work is definitively established. Again, it is highly likely that the proposed systems will be administered in a fashion that treats individuals differently solely on the basis of their race or national origin.

3. Discrimination in the Resolution of Conflicts Between Data Bank Records and Information Supplied by Employers

As the descriptions of the proposed systems reveal, even job applicants with worker authorization cards or work permit numbers or who fill out affidavit forms will not be permitted to work unless information submitted by the employer matches a particular data bank file. When an employer calls a permit number into the data center, or submits an employee affidavit, a government official must determine whether information submitted by the employer matches information on that employee in the government's possession. It can be expected that discrepancies between information furnished by the employer and existing or newly constructed data bank records will occur frequently. In many instances, there will be errors in the transcribing of information from the employee's original work permit application to the data bank record. In other cases employers will commit errors when relating particular information to the data bank clerk. Finally, there will be occasions where a job applicant is not legally authorized to work and is fraudulently using another person's work permit number and data bank record. Under the affidavit-based scheme, errors may occur in the employee's initial provision of data or in INS's search for existing government information on a particular employee.

These inevitable informational discrepancies will be resolved in a highly discriminatory fashion. As the above discussion suggests, questions about job applicants who are not apparently of foreign ancestry will be treated in a different fashion from questions about applicants who "appear" foreign or have foreign surnames. Informational discrepancies that arise for persons who are legal citizens, *i.e.*, white persons with Anglo-Saxon surnames, will be regarded as merely bureaucratic errors. Employers seeking government clearance on these persons will invariably be given the go-ahead by the relevant government official. Questions about job applicants who are of foreign ancestry will not be viewed in so cavalier a fashion. With persons who "may turn out to be" undocumented workers, government officials will feel an obligation to thoroughly investigate and resolve information conflicts. The job applications of these persons will be held up while questions are resolved. Obviously, persons whose authorization status is held in limbo will suffer in the labor marketplace compared with the job applicants whose "employability" is ascertained immediately.

4. Summary

Overall, the employer sanctions systems under consideration will discriminate against minority citizens in the preliminary granting of governmental permission to seek employment and in the resolution of conflicts that will arise over a particular worker's authorization status. In some respects, the systems are inherently designed so that they cause discrimination against poor blacks, Hispanics, Asians and other minority groups. In still more ways they are likely to be administered in a manner that discriminates against these groups.

B. Discrimination by Employers Against Minority Citizens and Legal Aliens

The employer sanctions schemes will furnish numerous opportunities and incentives to employers to discriminate on the basis of race and national origin. It can be expected that there will be a substantial increase in discriminatory hiring practices following implementation of any of the programs.

1. Impact on Employers' Attitudes and Perceptions

An extremely important factor in any assessment of the discriminatory impacts of an employer sanctions scheme is the way in which employers will perceive the objectives and values that underlie the scheme. Those persons extolling the nondiscriminatory virtues of objective verification systems focus exclusively on the prescribed structural design of the system. These commentators ignore the perceptions and attitudes that such schemes will encourage independent of the intended functioning of the systems.

An inevitable byproduct of a large-scale, highly publicized program of criminal and civil sanctions for the hiring of undocumented workers will be reinforcement of employer attitudes that are conducive to discriminatory hiring practices. Employers already disposed to discriminate against 'foreign-looking' persons will perceive that the new law not only legitimizes this behavior but actively encourages it. */ In order to achieve any significant level of deterrence, the new sanctions will have to be heavily advertised over the mass media. The principal message that will be conveyed will be the government's official denunciation of the practice of hiring undocumented aliens. It seems inevitable that already bigoted employers will interpret the official message as one sanctioning strict scrutiny of all 'foreign-looking' job applicants, particularly Hispanics, Asians and other minorities associated with the 'illegal alien problem'. Instead of receiving a uniform government message condemning discrimination in hiring, employers will be exposed to communications suggesting that the refusal to hire certain 'types' of persons is a good thing. The perception of systemic authorization to consider race as a factor when assessing potential employees will fuel the discriminatory hiring practices of employers presently biased against 'foreign-looking' job applicants.

We note that there is a considerable lack of sophistication in the ways that most people, including lawyers and others concerned

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*/ Cf. V. Briggs, The Quest for an Enforcible Immigration Policy, Employment and Training, p. 393 (Fall, 1979) (one result of an employer sanctions program would be to put the "moral weight" of the law against the employment of certain types of persons).

with social issues, distinguish between American born citizens, naturalized citizens, and various kinds of alien status. Such a lack of sophistication may be expected to confuse the hiring decisions made by employers. A widespread perception that hiring "aliens" is prohibited may extend to decisions about hiring legally resident aliens or naturalized or native citizens who manifest signs of foreign identity. Even were an identity card to be issued, there may still be obstacles posed to certain minority members by employers whose confusion and excessive caution would converge to form a reluctance or refusal to deal with "close cases". */

Moreover, employers who are not currently prejudiced may develop biased attitudes towards all job applicants of foreign ancestry as they are bombarded with government messages decrying the practice of hiring undocumented aliens. Instead of adopting a purely neutral stance of simply complying with the objective verification or recordkeeping requirements, these employers may easily be encouraged to take a more active role to prevent the hiring of unauthorized workers. Many employers may not draw the line at checking for valid worker identification cards submitting affidavits or contacting the

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*/ See Milton Morris and Albert Mayio, Illegal Immigration & U.S. Foreign Policy, (U.S. Department of Labor, October 1980.) Pg. V6:

> "In several localities where many legal immigrants from developing countries settle, the rest of the population often views them as "illegals". Through interviews with community leaders in several such communities (reported in a separate study), we found that local residents routinely commented about the country's illegal immigration problems by reference to this entire new immigrant population. Moreover, some immigrants complained about this perception of them as an affront, and a basis for discriminatory treatment."

These interviews are more fully reported in a forthcoming study by Morris and Martin Smith of the effects of current immigration patterns on localities, to be published by the Department of Housing and Urban Development.

national data bank. They may perceive these obligations as the absolute minimum requirements imposed by the government in the "war on illegal aliens". Patriotic employers may feel compelled to undertake additional policing tactics when Hispanics or other minorities apply for jobs. For example, employers may decide to scrutinize ID cards held by Hispanics to determine if they are counterfeited, a task they are not authorized to perform under the proposed sanctions schemes. Or employers may voluntarily seek more information on Hispanic or Asian job applicants than they would be obligated to under the programs. At the extreme, an employer wishing to 'assist' the government in its 'anti-illegal alien' crusade may simply decide not to hire anyone who the employer thinks is an undocumented worker. Despite the supposedly neutral verification system in place these employers will feel constrained to make subjective evaluations of work authorization status. Of course, this type of subjective assessment is precisely what the proponents of objective verification systems seek to avoid. It is apparent, however, that any widely publicized sanctions scheme will motivate many employers to make subjective determinations of legal status. Discrimination against American citizens of foreign ancestry and legal aliens will become just as inseperable a component of the proposed sanctions schemes as if a subjective verification system were officially instituted.

The employer sanctions system will create employer perceptions that are conducive to discrimination in another way. Again, in order to deter violations there will have to be repeated media broadcasts or other high-visibility communications stating that hiring undocumented workers is a criminal act. If these messages are effective, many employers will become fearful of incurring sanctions. These employers will perceive that the safest way to avoid sanctions is by not hiring anyone who could turn out to be an undocumented worker, i.e. any "foreign-looking" job applicant. In addition, unsophisticated employers may be unaware that their obligations extend only to objective verification of ID cards submission of affidavits and detailed recordkeeping. Receiving only the general message that "hiring undocumented workers is a crime," these employers may become frightened at the prospect of sanctions and avoid hiring anyone who could (in the mind of the employer) be an undocumented alien.

Even employers aware of their precise responsibilities may determine that accidental recordkeeping violations (for example, forgetting to make a notation of an employee's data bank number) would be inevitable. These employers may perceive that the best way to avoid sanctions under such circumstances would be by not hiring anyone who may be an undocumented worker. The assumption underlying this perception is that the government would be unlikely to investigate or prosecute an employer merely for a technical recordkeeping violation, i.e. when that employer has not, in fact, hired an undocumented worker. Therefore, employers knowledgable of program requirements may also feel that the programs pressure them to discriminate against 'foreign-looking' persons.

The foregoing discussion of the ways in which the proposed systems would affect employer attitudes highlights an inherent conflict between program effectiveness and the desire to minimize discriminatory impacts. The sanctions schemes' success in deterring the hiring of undocumented workers would largely depend on the government's success in making the new laws visible to employers. As the above analysis suggests, the higher the level of publicity surrounding the sanctions program the more likely it is that employer perceptions that are conducive to discriminatory hiring practices will be created and strengthened. Discriminatory behavior on the part of employers, therefore, appears to be an unavoidable byproduct of any employer sanctions law, since such a law must be widely publicized in order to achieve its intended results.

2.. The Programs Accord Discretion to Employers Which Will be Used in a Discriminatory Manner

The above discussion suggests how the employer sanctions schemes would influence employer perceptions in ways likely to lead to employment discrimination even if the verification systems were designed to be purely objective. Unfortunately, the proposed schemes are not designed to require employers to make only purely objective determinations. On the contrary, the programs would accord employers discretion to evaluate which employees are authorized to get jobs. As noted in the descriptions of the ID card and data bank systems, employers would be obligated to 'match' job applicants with worker authorization cards or data bank records. In the ID card scheme, employers would be required to determine that the applicant looks like the picture on the worker permit card, and is of the approximate height, age and weight specified on the card. In the data bank scheme, employers would be required to determine that information supplied by the government conforms to each job applicant's physical characteristics.

The discretion to match characteristics accords employers both an opportunity and an incentive to discriminate in hiring. For employers already disposed to discriminate, the systems create a seemingly legitimate pretext. Employers can justify the failure to hire Hispanic-Americans, blacks or any other minority citizens by claiming "he didn't look like the picture on the ID card" or "his age didn't seem to match that provided by the computer". Since matching someone's appearance with a picture or assessing a person's age are, in large measure, subjective processes, it would be impossible to distinguish between an employer's good faith efforts to comply with the program and a purposefully discriminatory hiring practice. Accordingly, the discretion furnished to employers to match identifying characteristics would insulate employers who are, in fact, discriminating on the basis of race from civil rights actions. */ By making it more difficult to prove illegal discrimination the programs would encourage bigoted employers to both continue and strengthen discriminatory hiring practices.

In addition, the discretion to match characteristics will be used in a discriminatory fashion by employers not predisposed to discriminate in hiring. When matching characteristics these employers

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*/ See p. 48, *infra* for explanation of how the discretion to match characteristics would furnish a legitimate-seeming pretext that could be used by employers to defeat Title VII actions.

will tend to impose differing standards of review for different 'types' of persons. For job applicants who 'appear' to be American citizens employers will invariably be lax when matching personal characteristics. The predictable response of employers confronted with applicants who are "obviously American citizens" will be that the process of matching characteristics is a useless charade, and therefore should not be taken very seriously. On the other hand, when these employers are confronted with "foreign-looking" applicants, they are likely to try to match identifying characteristics carefully. Most employers would realize that undocumented workers are ordinarily persons with a "foreign" appearance or a foreign surname. Employers would conclude that only persons with characteristics suggesting foreign ancestry should be subjected to "strict scrutiny" when employers are matching identifying factors. The purpose of the program would, apparently, be achieved by only carefully matching characteristics of those "types" of persons who may have undocumented workers in their ranks.

On a more selfish level, these employers would realize that strict scrutiny of foreign-looking persons would be an important way to limit their potential exposure to sanctions. Employers would perceive that carelessness in matching characteristics of persons who are "obviously" not undocumented workers would be unlikely to lead to the imposition of penalties. Conversely, employers would assume that intense care when matching characteristics of persons who "may" be undocumented workers is a necessary business strategy for limiting potential liability. It seems highly likely, then, that employers would develop distinct screening processes for persons "not likely to be illegal entrants" and for racial categories perceived as likely to contain undocumented aliens. The discretion accorded to employers to match identifying characteristics would be, as a matter of perceived business necessity, employed in a highly discriminatory fashion.

3. The Programs Would Create Economic Incentives for Employers to Discriminate in Hiring

The foregoing discussion reveals that the proposed systems would accord discretion to employers to determine which employees are authorized to work. Employers would exercise this discretion in a discriminatory manner, in part because of a perceived business motivation to do so. Even if discretion were not built into the systems, however, the programs would create positive business incentives for employers to discriminate against job applicants of foreign ancestry.

Many employers would decide that the regulatory requirements of the proposed systems hinder the operation of their businesses. At a minimum, requirements for detailed recordkeeping as to all job applicants, their ID numbers and their work authorization status will be perceived as burdensome. In addition, each of the programs would require employers to perform even more onerous tasks. The ID card and data bank programs would mandate that employers undertake some verification of the work status of all employees. The affidavit-based system would obligate employers to gather additional information on government request and to forward all records to a central location. Finally, because obtaining government clearance on all job applicants in each of the systems will take a substantial amount of time, many employers would conclude that the programs interfere with orderly hiring procedures.

It seems highly likely that employers will seek strategies for circumventing the recordkeeping and verification obligations imposed by the programs. The safest way for employers to ignore their administrative reposnsibilities and still avoid sanctions would be by not hiring anyone who may "turn out" to be an undocumented worker. It is unlikely that administrative officials will seek to prosecute an employer who has not, in fact, hired any undocumented workers. Enforcement efforts will focus on employers who will flout the clear purpose of the legislation by intentionally hiring undocumented alien workers. Employers sensitive to this may avoid liability by not hiring anyone who may be an undocumented worker. Accordingly, the programs will create positive business incentives to discriminate against job applicants of foreign ancestry for employers seeking to circumvent compliance with burdensome administrative obligations.

The proposed programs might also create business incentives to discriminate for employers who do not decide to circumvent the administrative responsibilities imposed by the programs. As suggested above, many employers will be concerned that errors will occur in the performance of administrative responsibilities. For example, employers may feel that accidental ommissions in the detailed recordkeeping required by the programs will be inevitable. Similarly, employers may perceive that miscommunications with government officials at regional data banks or at INS offices concerning the employablility of job applicants will frequently occur. Employers concerned with the high potential for administrative errors will fear that such errors will expose them to civil and criminal sanctions. As with employers intentionally circumventing program requirements, employers intentionally circumventing program requirements, employers concerned with accidental omissions will determine that the safest way to avoid sanctions is by not hiring anyone who 'may be' an undocumented worker. Employers aware of the high possibility of administrative errors will seek to ensure that these errors will be viewed by the government as mere 'technical' violations of regulatory obligations. As noted above, employers will realize the government will be unlikely to seek the imposition of sanctions against employers who have not, in fact, hired undocumented workers. Thus, employers will attempt to minimize the risks associated with recordkeeping mistakes by not hiring persons who 'may turn out to be' unauthorized workers. Again, the program will create business incentives for employers to discriminate in hiring.

There is still another way in which the proposed schemes would create positive business incentives for employers to discriminate.

As noted above in the data bank and affidavit-based systems there will be many occasions where discrepancies will occur between information supplied by employers and information held by government. These conflicts will be resolved in a highly discriminatory fashion; work applications of persons of foreign ancestry will be delayed while applications of other persons will be regularly approved by the government. This situation will create incentives for employers to discriminate in hiring in two ways. Employers will not view favorably job applications which are being delayed pending the government's investigation of discrepancies in information. Since employers generally wish to fill employment vacancies as quickly as possible, they will turn to job applications which have been cleared by the government. Employers will, out of business necessity, ignore the applications of persons which are held in limbo; these will almost exclusively be applications of persons of foreign ancestry. */

The government's unequal resolution of discrepancies in information will lead to employment discrimination on a more pervasive basis. Most employers will become familiar with the government's tendency to delay the work applications of persons of foreign ancestry where discrepancies in information occur. Accordingly, employers will view these applications from the time they are initially received in a less favorable light than applications of persons likely to be cleared by the government as a matter of course. An employer

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*/ See Section IIIA. supra.

will see no reason to go through the process of sending or phoning into the government an application which may be delayed pending an investigation when applications which will be summarily authorized are available. Many employers will feel that the programs pressure them to consider only job applications which will readily receive government clearance, i.e., job applications of persons not of foreign ancestry. Conversely, employers will disfavor job applications they perceive may frustrate efficient hiring practices: applications from Hispanics, Asians and other persons of foreign ancestry. */

A distinct but similar business incentive to discriminate is furnished by the affidavit-based system. Under this system employers will quickly realize that hiring or promoting workers of foreign ancestry increases the risk of business disruption on two levels. First, hiring these workers will substantially raise the possibility that INS will at some time require the employer to gather information on particular workers. INS will obviously concentrate its review and followup of affidavits on persons with foreign surnames or foreign appearances. Second, in the affidavit-based system, employers hiring Hispanics or Asians take a grave risk that at some indeterminable point in the future, INS will decide these workers are undocumented and should be fired. These employees may be trained and established in jobs before INS screens their affidavits and

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*/ As noted at p. 38, *infra*, the government's tendency to enforce the various schemes in a discriminatory fashion will also furnish employers with incentives to refrain from hiring foreign-appearing workers. In light of these legitimate business concerns, the proposed schemes may substantially enlarge the operation of the business necessity defense to Title VII suits. *See* legal analysis at p. 48, *infra*.

determines they are deportable aliens. The only way to minimize the risk of such an occurence would be by not hiring or promoting anyone who "may be" undocumented, i.e., any person of foreign ancestry. In these ways, the programs create unique incentives for employers to discriminate against job applicants solely on the basis of their racial characteristics.

C. Special Discriminatory Features of David North's New Hires Reporting System

Because David North's proposal for a New Hires Reporting System ("NHRS") */ has received particular attention from the Commission staff, careful analysis of its potential for discrimination is warranted. While this system may minimize employer discretion in determining work authorization it would leave intact incentives to discriminate. In addition, the NHRS would also create unique opportunities for employers predisposed to discriminate. **/

This system would require an employer merely to ask each new employee to fill out a form and to present some documentation. The employee would be told that he was liable to fines or prison terms for making false statements. The employer's duty would be to maintain files and submit them to INS for screening, which INS would do in consultation with other government agencies such as IRS. The employer would be liable for either recordkeeping violations or a pattern and practice of hiring undocumented workers.

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*/ See description at p. 9, supra.

**/ It should be noted that North has admitted the NHRS would increase employment discrimination. See D. North, Employer Sanctions Without a Work Permit: An Exploration of an Alternative, p. 10. This express recognition from the principal advocate of the NHRS should suggest that it be rejected.

It is obvious that an extensive enforcement procedure is essential for success of the reporting system proposed by North, since it contains no guarantees against fraud. Deportable aliens filling out reports could simply 'borrow' personal information from documented workers. Moreover, undocumented aliens could, in collusion with employers, submit no reports at all. Unfortunately, the enforcement efforts necessary to prevent such fraud would inevitably be conducted in a discriminatory manner.

As the description of the NHRS suggests, INS would selectively screen the 70,000,000 reports that would be submitted by employers each year. The criteria that would be used for identifying applications worthy of further scrutiny would place unequal burdens on aliens, minority citizens and all persons of marginal economic or social status. Groups suggested by North for particular attention are young male applicants, persons who needed help in completing their forms and those who did not indicate the country of their birth or the name of their elementary school. Other groups likely to be the focus of INS' screening process would be aliens and persons with surnames suggesting foreign ancestry. */ Employers hiring large numbers of persons in these "scrutinized" categories would, in turn, be subjected to special attention by the INS. This attention may take the form of requests for "follow-up" data on particular employees or on-site spot checks of business records.

To avoid disruption of their operations and possible sanctions for recordkeeping omissions, employers will seek to deflect INS

**/ As noted at p. 37, INS' present enforcement activities focus almost exclusively on persons with characteristics suggesting foreign ancestry.

attention away from themselves. */ As we have argued elsewhere the simplest way to avoid such attention is to not hire types of workers who will invite it.

The New Hires Reporting System will also furnish new opportunities for employers predisposed to discriminate. As noted above, employees would be required to specify their legal status in the United States. Obviously, employers will have access to this data as it is their repsonsibility to forward the forms to the government and to keep them on file. Thus, employers will know whether applicants are native born citizens, naturalized citizens, permanent resident aliens or aliens legally present in the United States. Xenophobic employers can be expected to use this information to discriminate in hiring and promotion against all but citizens or all but the native born. **/

Even employers not predisposed to discriminated may react to knowledge of a worker's status in a discriminatory way. As noted above, many employers lack an awareness of the legal implications of the varieties of immigration status. ***/ In particular, employers often do not understand whether persons with particular types of immigration status are authorized to work. Thus, employers learning from new-hires forms that potential employees are aliens or naturalized citizens may suspect or believe that such persons are not permitted to work and refuse to hire them.

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*/ An employer would feel particularly inclined to shield himself from attention in view of the fact that, under the proposed system he would be liable for a pattern and practice of hiring undocumented workers regardless of his compliance with reporting requirements. Clearly, the only certain way for him to avoid liability would be to avoid hiring any "doubtful cases" at all.

**/ The discriminatory porcess that will occur is a variant of the pre-employment inquiries unrelated to job performance that have been condemned by various federal agencies. See, e.g. Department of Labor Regulations Implementing Rehabilitation Act Amendment of 1974, 29 C.F.R. § 32.15 (1980) (employer may not conduct pre-employment inquiries of an applicant for employment or training as to whether the applicant is handicapped).

***/ See discussion at p. 21, supra.

Thus, the New Hires Reporting System leaves intact both the business incentives to discriminate against "workers who might be undocumented" and the employer's discretion in determining the sufficiency of any proof of eligibility which an applicant may present. It therefore continues to pose a high likelihood of discriminatory impact.

Each of the systems for verification of employee eligibility is intended to be objective and to avoid the possibility of unintentional or intentional discrimination by employers. However, each of these systems leaves intact either or both of an employer's discretion in determining eligibility and the business incentive to discriminate against workers who may later be found ineligible. All these systems are highly likely to result in discrimination against minority workers and should, therefore, be rejected.

IV. THE PROGRAM WILL INCREASE LAW ENFORCEMENT DISCRIMINATION

A. Discrimination in INS Enforcement Activities

It seems obvious that employers who presently rely on an undocumented alien labor supply will not voluntarily comply with a ban on the hiring of these workers. Accordingly, if the sanctions scheme is to have more than a negligible impact on hiring practices, there will have to be an extensive enforcement effort on the part of INS. Unfortunately, it is ineveitable that methods for enforcing the sanctions scheme against employers will result in discrimination against workers of foreign ancestry.

The only feasible method for enforcing the new law would be periodic spot checks of businesses, involving on-site checks of business records and comparison of these records with the actual authorization status of employees. Since the ultimate purpose of the employer sanctions program is not simply to compel employers to comply with detailed recordkeeping requirements, but rather to deter the hiring of aliens who have illegally entered the United States, investigating officers will focus their efforts on checking the authorization status of workers suspected of being deportable aliens. Current INS practices, as documented by the United States Commission on Civil Rights, suggest that workers likely to be considered undocumented would almost exclusively be Hispanics, Asians and blacks.[*] Only employees with certain racial characteristics will be subjected to humiliating work status checks during INS enforcement visits.

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[*] According to the Report of the U.S. Commission on Civil Rights, *The Tarnished Golden Door, Civil Rights Issues in Immigration* 85 (1980), current INS investigations are conducted in a highly discriminatory manner. When INS agents conduct factory raids, they interrogate individuals soley on the basis of their skin color or ethnic appearance.

Even if INS were to conduct checks in random fashion rather than targeting foreign-looking workers, problems that may arise in the ascertainment of workers' status will be resolved in a discriminatory manner. Any complications in the determination of the status of foreign-looking workers will be interpreted as indicating that that worker is illegally present in the workforce. For example, an Hispanic or Asian worker who happens to forget his ID card may be presumed by INS officials to be an undocumented worker. Similarly, any discrepancy arising between an Hispanic worker's actual characteristics and a data bank record will be perceived by INS agents as evidence of undocumented status. As a result, workers of foreign ancestry will be subjected to arrests, searches and seizures solely on the basis of their racial characteristics. Conversely, _if_ any whites are subjected to status checks in the first place, complications that develop will not be viewed in a similarly sinister light. With persons unlikely to be illegal entrants, difficulties in the ascertainment of work status will be viewed as mere administrative mistakes. These persons will be presumed to be legitimate workers regardless of any problems INS agents may have in making determinations of status. The result of this selective law enforcement will be the exposure of workers with particular physical characteristics to INS harassment.

Discriminatory INS enforcement practices sure to arise upon adoption of a sanctions program will have other serious consequences. It is suggested above that employers who become aware of the government's tendency to "hold up" job applications of

Hispanic or Asian workers pending analysis of their work status will perceive a business incentive to ignore the applications of these persons. */ Employers will also quickly realize that foreign-looking workers, regardless of the legality of their status, are considerably more likely to be exposed to authorization checks and detained by INS agents than white workers. This will furnish employers an additional incentive to discriminate in hiring and in promotion. In order to avoid disruptive and time-consuming authorization checks and the disruption of production resulting from removal of a worker, employers will refuse to hire persons they perceive as being susceptible to such checks or such removal. **/ Employers will be less likely to put those whom they do hire in responsible positions, since the temporary detention or removal of a supervisor would be even more disruptive than the removal of an ordinary worker. Thus, the discriminatory techniques that will be used by INS to enforce the sanctions program will result in discriminatory employment practices. We note also that if, as seems quite likely in the light of past history, INS were to target workplaces for spot inspection according to the concentration of foreign-looking workers therein, an employer wishing to avoid the disruptive effects of spot checks of this kind would find it easiest to simply avoid hiring types of people whose presence in his workforce would subject him to particular scrutiny.

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*/ See p. 31, supra.

**/ See Testimony of George Lundquist to the Civil Rights Commission, Texas Open Meeting Transcript, Reported in The Tarnished Golden Door, Civil Rights Issues in Immigration, United States Commission on Civil Rights (1980) pg. 72 regarding the consequences of an INS factory raid: Mr. Lundquist said that the first attempt to verify the lawful status of employees, was

> "really disruptive.... There ...[were] fantastic anxiety levels. Where things were normally running smoothly at 10 minutes after 7, there was no flow. There was lots of discussing, lots of talking, lots of - just nervousness. It took about 20 minutes, 30 minutes for them to check these 60 people."

B. Discrimination by State and Local Law Enforcement Agencies

The foregoing section describes how an employer sanctions scheme would inevitably be enforced by INS in a highly discriminatory fashion. Of even greater concern are the discriminatory law enforcement abuses by state and local police officials that will flow from adoption of the employer sanctions program.

At present, despite their inability to make accurate determinations of immigration status, local police are heavily involved in the enforcement of immigration laws, in large measure because of prompting by the INS .*/ It is also clear that these local immigration law enforcement activities occur in a highly discriminatory and abusive fashion. There are numerous examples of local police departments systematically making investigative stops and arrests solely on the basis of racial and ethnic characteristics.**/

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*/ See The Tarnished Golden Door, Civil Rights Issues in Immigration 91 United States Commission on Civil Rights (1980); The Border Patrol Handbook, 11-7 which is published by the INS provides that the "continued cooperation of all local law enforcement authorities must be sought and cultivated."

**/ In The Tarnished Golden Door, Civil Rights Issues in Immigration 91 (1980) the United States Commission on Civil Rights describes one instance. In Moline, Illinois the city police department instituted a practice whereby its officers would enter local neighborhood establishments and interrogate persons of Latin ancestry about their status in the United States, although the overwhelming majority of those interrogated were United States citizens or legal resident aliens. The lack of sophistication and careless attitudes of many local law enforcement officers is illustrated by a trial transcript quoted at age 92:

> Q. Now is this the normal routine that you follow when you arrest Mexicans in Grand Praire?
> A. Are you speaking of an illegal alien or a Mexican?
> Q. Well, how can you tell the difference? Do you know what the difference is?
> A. No sir. When I can't determine, that's why I put them in jail for investigative charges.

Because of their lack of expertise in making immigration status determinations local police regularly arrest and detain American citizens of foreign ancestry. Many such citizens who have committed no crimes at all are arrested and jailed simply because they have no detailed proof of legitimate immigration status. */

The already pervasive and discriminatory local law enforcement practices would be multiplied manifold by an employer sanctions program. Local officials would perceive the program as an invitation to increase involvement in enforcement of immigration laws. The widespread publicity the new program must receive in order for there to be any significant level of effectiveness would reinforce local officials' perceptions that undocumented workers are an insidious national problem. As a result, these officials would experience a renewed sense of responsibility to assist in the detection and deportation of illegal entrants.

The sanctions program would also increase local enforcement of immigration laws by furnishing a simple mechanism for the detection of unauthorized workers. Local police officials will, along with everyone else, realize that worker identity cards and data bank records are only furnished to "Americans". These officials will arrive at the conclusion that persons without authorization cards or data bank records are deportable aliens. This understanding, in combination with the heightened desire to "catch" aliens, will substantially increase the number of discriminatory stops by local

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*/ In one case, Cervantez v. Whitfield, No. 79-206 (N.D. Tex. Filed Dec. 12, 1979), an American citizen of Hispanic ancestry was arrested and incarcerated for three days solely because he did not have on his person the necessary documentation to prove his United States citizenship.

police. The introduction of a straightforward and efficient method for assessing legality of presence will accord local police an extraordinary temptation to stop foreign-appearing persons and demand proof of their status. The apparent ease with which a deportable alien can be discovered will motivate many local police officers to check the status of all minorities who "may be undocumented", i.e. Hispanics, Asians and other persons of foreign ancestry.

Thus, the sanctions program will greatly increase the number of American citizens who will be stopped and subjected to humiliating interrogation by local police for no reason except their race or national origin. In addition, a large proportion of these citizens may be arrested, searched and detained as a result of status checks by local police. Many individuals will not carry their identification cards at all times. Since the cards are for work status ascertainment by employers, most persons would, quite reasonably, not consider it necessary to keep the cards in their possession at all except when applying for a job. Many more persons would carry the card irregularly, perhaps only bringing it to their jobs. Finally, a large number of citizens and legally admitted aliens, such as the self-employed, will not have applied for work status and therefore will not have acquired worker identification cards they are entitled to. When foreign-looking persons are stopped by local police, valid claims that cards have merely been left at home or have not yet been applied for will fall on deaf ears. Local police will assume illegal status and arrests and detentions are sure to follow. */

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*/ The burdens likely to befall mistakenly arrested Hispanics are suggested by the practice of the El Paso Police Department (Reported in The Tarnished Golden Door, supra at Pg. 93), which returns people without documentation forthwith to the Mexican side of the border.

Moreover, even when an Hispanic citizen who is stopped by local police presents a legitimate identification card, there is no assurance he will not be exposed to continued harassment. Since local police will systematically interrogate persons "most likely to be" undocumented, they will take a skeptical view of identification cards that are presented. Past experience suggests that, whatever the reasons, there is an inclination on the part of local police to be highly skeptical of claims of legal presence made by Hispanic Americans in certain areas. Thus, when comparing photographs or data on an identification card with actual physical characteristics, police will engage in an extremely searching scrutiny. This skepticism may lead them to conclude that apparently valid identification cards are counterfeit. In either case, local police will arrest, search and detain many "foreign-looking" citizens and legally admitted aliens as a result of the new sanctions program.

The foregoing discussion suggests that an increase in discriminatory law enforcement practices will result from the desire of local police departments to assist in enforcement of immigration laws. Many local police officials will perceive that the sanctions scheme facilitates their "needed" involvement in the detection of deportable aliens. Unfortunately, many more local police, without even a purported law enforcement motivation, may see the program as an opportunity to abuse and harass racial minorities. The program extends to bigoted police a new tool for social repression. Particularly in inner cities where racial tensions between residents and police already run high, police may stop blacks and other minorities upon little or no suspicion of criminal activity and demand their identification cards. A failure to produce the card, for any of the reasons enumerated above, will lead to additional harassment and possibly detention.

C. Additional Civil Liberties Consequences of Abusive Law Enforcement Practices

The law enforcement abuses that will result from adoption of a sanctions scheme may have even more frightening consequences than those described above. Foreign-appearing persons and other minorities may, over time, gain an awareness that not carrying an identification card is a dangerous business. As the number of INS spot checks and local police investigatory stops increases, many minority citizens will determine that the safest course of action is to carry the identification card at all times. This may be perceived as the only means to minimize the possibility of law enforcement harassment and abuse. Thus, it is forseeable that a _de facto_ system may develop where particular minority groups feel compelled to constantly keep their work identification cards on their persons. The effective result would be an "internal passport" for certain identifible minorities, a system generally associated with totalitarian regimes.

V. LEGAL CONSIDERATIONS

In the preceding sections of this memorandum, we have discussed the potential discriminatory effects of employer sanctions proposals. This section explains how those discriminatory effects will lead to specific violations of civil rights statutes (particularly Title VII of the Civil Rights Act of 1964) and the constitution (particularly the Fifth & Fourteenth Amendments).

A. Types of Discrimination

The proposed work authorization systems are intended to be fair in form, and to preserve the right of legal residents to work without unduly burdening that right. However, in operation the systems will create real obstacles to employment for racial and ethnic minorities, and for resident aliens. As argued in Section III above, the administrative processing of work applications will operate against those unfamiliar with or intimidated by bureaucracy and those seeking relatively insecure positions at the low end of the wage scale, especially those applicants whose prior history of employment is minimal and in occupations where documentation is unlikely to be available. At each stage of the work authorization process, "foreign-looking" and minority applicants will be at a relative disadvantage, both because of the history of discrimination against them, which will be reflected in their diminished ability to produce satisfactory documentation, and because bureaucrats will view them with more suspicion than applicants apparently from the mainstream of American society. As argued in Section IV above, law enforcement officials are highly likely to use discriminatory criteria to focus their enforcement efforts, thus fostering discrimination in hiring and promotion by employers seeking to avoid the disruption of production which might result from removal of a worker, and also subjecting minority citizens and resident aliens to particular burdens upon personal liberty.

As argued in Section III above, the proposed schemes will encourage employers to view certain kinds of people with suspicion, and this will result in discriminatory hiring decisions. Some of these decisions will result from caution. Other employers will use the sanctions program as a pretext for discrimination. In the event a card is lost, or an employer is suspicious that a card has been altered, or that the card carrier is not the person to whom the card is issued, an inescapable degree of subjectivity is incorporated in the systems. Subjectivity in hiring decisions is a ready vehicle for discrimination, whether intentional or not, that has been condemned by the courts. _See_, _e.g._, _Rowe v. General Motors Corp_, 457 F.2d 348, 359 (5th Cir. 1972). Any program which encourages such subjectivity in employment decisions is of doubtful legality and should be carefully scrutinized. Even if such opportunities for subjective judgments by potential employers were eliminated, however, the overall structure of the programs is so inherently discriminatory that they are inconsistent with both Title VII and the Constitution.

B. _Employer Sanctions and Title VII_

"The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Since in their operation the various employer sanctions systems are likely to result in increased employment discrimination, they will create and foster precisely the kinds of practices which Title VII seeks to eliminate. Furthermore, such schemes will provide pretexts for discriminatory practices, or defenses to discrimination claims, which will make the prosecution of claims considerably more difficult. */

1. Disparate impact

Employment qualifications with a disparate impact not related to business necessity were condemned under Title VII in Griggs v. Duke Power Company, 401 U.S. 424 (1971). ("What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract.")

As explained above, each of the proposed employer sanctions schemes creates inequalities in access to work authorization, which would be essential to obtain any job. However, the actual possession of such work authorization is certainly not related to capacity to perform a particular job. Nor is it, in view of the room for mistake and delay in granting authorization, a reliable indicator of an individual's actual status. In this respect any one of the schemes is

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*/ Since it is highly likely that any of the proposed employer sanctions schemes will result in an increase in the number of actions that are brought under Title VII, they will also add to the already heavy burden felt by the Equal Employment Opportunity Commission in its attempts to enforce Title VII. The present backlog of cases at the Commission is roughly 70,000. Between 7,000 and 10,000 new complaints are received by the Commission every month. Clearly, the creation of a significant number of new cases will slow down the rate at which all minority persons may expect relief from the administrative process.

inconsistent with Title VII's prohibition against the use of criteria (in this case actual authorization) which are unrelated to job performance to deny job opportunities to minority workers at a substantially higher rate than to white workers. The effect of the employer sanctions programs would thus be to create a broad exception to Title VII; practices with disparate impact would be condemned, except where such impact results from implementation of an employer sanctions scheme. Any proposal which is so plainly inconsistent with the fundamental purposes of Title VII should be rejected.

2. Disparate Treatment

Under the Supreme Court's analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a plaintiff establishes a prima facie case of employment discrimination when he shows that 1) he belongs to a racial minority; 2) he applied and was qualified for a job; 3) despite his qualifications, he was rejected; 4) the position remained open after his rejection and the employer continued to seek applicants with the plaintiff's qualifications. Once this much is established, the burden shifts to the employer to "articulate some legitimate non-discriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, supra at 802.

This elaboration of the requirements of Title VII is clearly intended to prevent deliberate racial or national origin discrimination. Our discussion at Section III above suggests that there will be many instances under any employer sanctions scheme, where a minority citizen or legally resident alien will be subjected to uncertainty and delay in determining work authorization or to questions about whether his physical characteristics conform to an identification card or government information. Under such circumstances, the vagaries of the sanctions system may well provide an employer with a "legitimate, non-discriminatory reason" for a refusal to hire, even where the employer's actual intention is to discriminate on the basis of race or national origin. It would be extremely difficult for an employee to prove that such reason was actually a pretext.

That this is not an insubstantial concern is indicated by the language of two Supreme Court opinions purporting to provide a gloss on McDonnell Douglas Corp. v. Green, supra. In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), the Court said

> [the employer] need not prove that he pursued the course which would enable him to achieve his own business goals and allow him to consider the most employment applications.

Id. at 577 (emphasis added). Therefore, under the proposed systems, an employer may deny applications with impunity by claiming that there was a serious questions as to the authenticity of a minority applicant's work authorization.

In Board of Trustees v. Sweeney, 439 U.S. 24 (1978), the Supreme Court drew a careful distinction between "articulating some legitimate, non-discriminatory reason" and "proving absence of discriminatory motive", rejecting the latter formulation of the rebuttal required by the employer to defeat a prima facie case. In light of this relaxed standard of proof, it may be very easy for a discriminatory employer to escape liability, or at least to shift the burden of proof back to the complaining employee. Procedures such as the employer sanctions systems which so radically alter the nature of proof required in Title VII actions should be rejected.

C. Due Process Considerations

Among the practical results of the various schemes which have been proposed are

1. Particular difficulties for marginal and minority workers in obtaining work authorization.
2. The loss of immediate job opportunities while a "doubtful" worker is subjected to scrutiny.
3. The fostering among employers of a sentiment disfavoring employment of "aliens."
4. The delegation of discretion to employers to determine a worker's status.
5. The creation of economic incentives for employers to discriminate.

Thus, we are here faced with government action which heavily burdens an individual's basic right to pursue a livelihood. Hampton

v. Mow Sun Wong, 426 U.S. 88, 116 (1976). See also, Board of Regents v. Roth, 408 U.S. 564, 572-74 (1972). As such, any of the proposed sanctions schemes constitutes a potential violation of Due Process on several separate grounds. First, insofar as a scheme denies immediate authorization to persons whose applications are deemed "questionable," or grants authorization which is so contingent that it discourages an employer from hiring an "uncertain" worker, it deprives them of liberty and property without a hearing of any kind. Such a denial without any procedural safeguards would violate the Due Process Clause. See Vitek v. Jones, 63 L. Ed. 2d 552 (1980); Meachum v. Fano, 427 U.S. 215 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972).

Second, insofar as any scheme fosters a perception disfavoring alien employment or creates economic incentives for employers to discriminate, it is infirm unless rationally related to a government interest. As argued at Section VI(A) below, it is by no means clear that any of the schemes represents a rational response to the social problems that it purports to address. This too violates the right to Due Process.

Third, the sanctions schemes are both under-inclusive and over-inclusive in creating a presumption of ineligibility for employment. We have dealt at some length (see Section III(A)) with the difficulties which socially or economically marginal individuals and many minority citizens and aliens will have in proving their right to work authorization. In the absence of clear documentation they will be subject to burdens upon employability, even though they may actually be legally entitled to work. Conversely, the schemes are also over-inclusive, because they presume the eligibility of persons who may not be entitled to work at all, but have previously paid taxes and had social security withheld. This too would violate the requirements of Due Process. See Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)(Powell, J., concurring.)

We note also that many of the proposed schemes delegate to an employer the authority to determine the right of an individual to work. Insofar as this authority is delegated under vague standards, such delegation may be subject to challenge as encouraging arbitrary and capricious action by agents of the government. Courts have carefully scrutinized delegations of legislative power to the executive to ensure that they contain definite standards. Osius v. City of Clair Shores, 344 Mich. 693, 75 N.W. 2d 25, 26 (1956). See Kent v. Dulles, 357 U.S. 116 (1958) and American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946).

Where an employer sanctions scheme delegates to an employer discretion to determine the work authorization status of an individual worker, as the I.D. card and data bank schemes do, it delegates directly to a private party the power to make decisions according to standards which are too vague. If we conceive of any such scheme as a delegation of legislative power to the executive which in turn delegates it to a private party, then it seems to run afoul of the traditional limitations on such delegation. On the other hand, we may assume that the delegation of legislative power is valid, and conceive of such schemes merely as delegations of enforcement power to a private party. Insofar as such enforcement power is likely to adversely affect those whom it should not, as argued above at Section III(B), it creates the possibility of arbitrary and capricious action. Such action would be illegal if taken by an executive body and must surely be even more illegal when taken by a private agent or delegate of such an executive body.

D. Equal Protection Considerations

We have argued that each of the proposed systems will result in substantial discrimination, on the basis of race and national origin, against minority citizens and legally resident aliens. While the proposed legislative classifications may in themselves not be discriminatory, their consequence will be unequal treatment of similarly situated groups. Those groups who will be burdened are "identifiable classes of persons who, entirely apart from the system itself, are already subject to disadvantages not shared by the remainder of the community." Hampton v. Mow Sun Wong, 426 U.S. 88, 102. Where, as here, proposed systems of classification are inherently susceptible of discriminatory application against protected groups, they violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, */ Yick Wo v. Hopkins, 118 U.S. 356 (1886), unless justified under an exacting standard.

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*/ While the Fifth Amendment contains no explicit references to equal protection, the Supreme Court on numerous occasions has held that equal protection of federal law is guaranteed by the Due Process Clause and that equal protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment. E.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

The Supreme Court has ruled that distinctions based on national origin or race, such as will inevitably result from employer sanctions schemes, are subject to the test of "strict scrutiny." Oyama v. California, 322 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943). The Court has consistently required that the adoption of a suspect classification must satisfy a "heavy burden of justification," McLaughlin v. Florida, 379 U.S. 184, 196 (1974), a burden which, though variously formulated, requires the government to meet certain standards of proof when the classification is challenged:

> In order to justify the use of a suspect classification, the Government must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.

In re Griffiths, 413 U.S. 713, 721-22 (1973) (footnotes omitted).

We note below at Sections (VI) and (VII) that there are serious questions about whether employer sanctions effectively address the problem of illegal immigration and its adverse social impact, and about the practical effectiveness of any such scheme in deterring employer misbehavior. We note also that there are less discriminatory methods for accomplishing many of the ends which employer sanctions wish to accomplish. On such a record, none of the proposed schemes meets the burden of justification necessary to sustain it against a challenge on Equal Protection grounds.

VI. GENERAL CONSIDERATIONS

A. Employer Sanctions - Clear Assumptions and an Uncertain Reality

The distinct purposes of employer sanctions programs are interrelated, but need to be distinguished for purposes of analysis. The broad purpose is to discourage unauthorized entry into the United States by removing what some commentators hold to be the primary incentive to such entry, viz. employment opportunity. The narrower purposes are twofold. There is, on the one hand, the perceived need to counter the direct displacement of American workers by unauthorized workers, or the disadvantaging of American labor by a swelling labor supply during a period of high unemployment. There is also a widespread perception that those who do work illegally are frightened by virtue of their clandestine status, docile by virtue of this and their lack of economic options, and eminently exploitable by virtue of the fact that even the marginal American economy offers them a vast improvement over their accustomed working and living conditions. In this context, employer sanctions appear as a way to inhibit the development of this marginal sector of the economy by imposing costs on an employer to offset any economic advantage he may derive from employing particularly vulnerable workers. The desired end is to inhibit the depressing effect of undocumented workers on working and living standards in general, and therefore to force such jobs into the mainstream economy where they will seem desirable to citizens and legally resident workers. An important incidental result is the drying up of employment opportunities for undocumented workers.

To conclude that employer sanctions would significantly ameliorate these problems requires that one make two essential assumptions. The first is that the marginal (sometimes called "secondary") economy is what it is because it employs vulnerable undocumented workers. The other is that the inhibition of the "pull" factor of job opportunity will have a significant effect upon migration patterns which by common agreement are the result of a complex "push-pull" phenomenon, including conditions in the source countries, physical proximity, ease of access (particularly through the services of alien-smugglers or "coyotes") and cultural and family ties.

We do not argue that these assumptions are categorically wrong. We do believe, however, that there is sufficient doubt about their validity to suggest caution in proposing ways to deal with the problem of unauthorized immigration. No employment regulation scheme which raises serious concerns about civil liberties and discrimination can be premised on such a scant showing of appropriateness and effectiveness.

We note that many American industries have moved to third-world nations in response to a perceived economic need to do so. Since many of these are akin to those still here which employ undocumented workers, one cannot entirely ignore the possibility that such industries would move their operations to places which offered them the vulnerable labor force which might be denied to them by employer sanctions. Clearly, the benefit to American workers would be nil.

We note also that economists such as Michael Piore and Roger Waldinger of the Massachusetts Institute of Technology have suggested that the marginal economy may exist in its present form by virtue of its function in the total economy distinct from the availability of migrant labor. If this is so, then there is considerable question about whether inhibiting the employment of migrant labor will do much to raise wages and standards in this marginal sector. Indeed, as Piore suggests, many mainstream jobs are dependent upon the marginal economy, (Undocumented Workers and U.S. Immigration Policy, Appendix D, American Friends Service Committee Testimony to the Select Commission, San Francisco, June 1980.) Clearly, speculative as all this is, there is no way to convincingly argue one way or the other. However, we are convinced that a good deal of further analysis and research is necessary before one may feel confident that one has not devised a counter productive scheme.

We note also that job opportunity is but one of the many factors which contribute to the flow of migrants, authorized or not, to the U.S.A. If employer sanctions are effective in inhibiting particular job opportunities, they may nevertheless only marginally inhibit the migrant flow itself. This outcome would threaten to create a large undocumented population, lacking economic self-sufficiency, which would either impose other social costs, on public order or medical services for instance, or would increase the labor force available to an underground economy.

Indeed, if the factors other than job opportunity which lead to unauthorized migration are as intractable as they appear, */ the flow of people will continue towards whatever percentage of the job market remains free of the effects of employer sanctions enforcement. It is particularly ironic that a scheme that is at least partly designed to save the jobs of minority workers is likely, as argued above, to cause employment discrimination and to place particular burdens upon marginal and transitional workers, a large proportion of whom are black or Hispanic Americans. It is clear that any scheme which imposes the social and financial costs that employer sanctions does must offer a more certain outcome.

We may add to such uncertainty about the social outcomes of employer sanctions an equal uncertainty about precisely how sanctions will influence employer behavior. In as far as sanctions will require a showing of intent on the employer's part, they will be

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*/ Such factors include: a) the perception, as evidenced by the entertainment of the hazards of surreptitious entry by present migrants, that the superiority of opportunities and standard of living in the U.S.A. over those in the source country merit a serious attempt to overcome obstacles (such as employer sanctions, perhaps). One may expect even an underground economy in the U.S.A. to continue to offer better wages and conditions than the economies of the source countries; b) the impulses provided by family and cultural ties, which lead a migrant to expect aid and comfort in dealing with such obstacles; c) the lack of economic opportunity in the source countries. Much of this is the result of the investment policies of the corporations and governments of the developed world in the developing world. (See Gustavo Esteva, The Future of Rural Mexico, Appendix E, American Friends Service Committee Testimony Submitted to the Select Commission, San Francisco, California, June 1980). The displacement of peasants and craftspeople by capital intensive investment and the maintenance or intensification of inequalities in wealth which result from these clearly constitute a compelling "push" factor for widespread immigration, particularly from nations in close proximity to the U.S.A. (See Milton Morris & Albert Mayio, Illegal Immigration and United States Foreign Policy (U.S. Department of Labor, October 1980) pg. V-32, to the effect that economic pressures for migration can be so compelling as to make the availability of jobs at the destination irrelevant, as evidenced by large scale rural to urban migration despite a total lack of opportunity in urban centers.)

enforced only at great effort, perhaps never effectively enough to have the desired nationwide impact. In as far as they will depend upon a showing of formal non-compliance with recordkeeping requirements or a pattern and pracice of wrongdoing, they will become alternative costs of doing business, to be absorbed as the costs of compliance might be. Either way, one may expect greater exploitation of unauthorized workers with a consequent depression of the labor market, as employers compensate themselves for the costs of a sanctions scheme by exploiting their workers more thoroughly to preserve profit margins.

B. Employer Sanctions and Civil Liberties

If an employer is to be effectively subjected to penalties, then it is important to devise a precise system of recordkeeping and enforcement. This is necessary to discourage the "overkill" defensive reaction of refusing to hire all foreign-looking workers. However, the more detailed information about a worker that needs to be stored and retrieved, the more civil liberties concerns are raised. It also seems that in order for there to be effective monitoring of the viability of an individual's application to work, government officials would need to cross-check with other data systems. Increased government access to personal data on such a massive scale raises serious concerns about privacy. */

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*/ The proposal of a uniform identification card may dispense with the need to store or frequently retrieve information about a worker, but in as far as it does so, it is susceptible to fraud by a worker, an employer, or both and therefore ineffective. Furthermore, an identification card raises civil liberties concerns about law enforcement practices, as detailed above in Section V.

VII. MITIGATING THE ADVERSE IMPACT OF UNAUTHORIZED EMPLOYMENT - ALTERNATIVE MEANS

The Institute for Public Representation suggests that the three aspects of the unauthorized employment problem which can be attacked without threatening civil rights or liberties are 1) the economic dynamics of underdevelopment in the source countries (insofar as American aid and investment practices are responsible for these); 2) the ease of access over the land borders, particularly the operations of "coyotes" or alien-smugglers; and 3) the incentive that exists for employers to hire undocumented workers. We propose that the Commission recommend measures which are designed to deal with these aspects of the problem.

1) Development aid and investment policies should be tailored so as to encourage labor-intensive development. Not only will this constitute a frontal attack on the very conditions which impel migration (perhaps regardless of "pull" factors) but it will also have valuable incidental effects. Whereas employer sanctions would emphasize national self-preservation at the cost of inhibiting the economic relief that source countries derive from migration, a precisely targeted aid and investment policy would both reduce the incentive to migrate and make the lack of such migration economically tolerable. Such a policy would contribute to the stability of our neighbors and other source countries, whereas merely choking off migration might increase their instability. This also promises to be a more thorough-going and permanent amelioration of the total complex which produces large-scale unauthorized migration.

2) There should be a thorough revaluation of the effectiveness of exclusion at the land-borders. We believe that the best targeted and most cost-effective scheme would be one which concentrated upon the investigation, apprehension and vigorous prosecution of "coyotes", or smugglers of unauthorized entrants. In view of the limited resources available and the length of our land borders, such a scheme would represent the most systematic and focussed attack on an admittedly difficult problem.

3) Laws which are designed to regulate union organization should be expanded to cover agricultural and domestic workers. Laws should be enacted prohibiting INS from responding to employers' complaints about unauthorized workers in their establishments when union organizing attempts are underway or when employers are found in violation of labor laws. Finally, there should be expanded enforcement of laws such as the Fair Labor Standards Act and the Occupational Safety and Health Act, which monitor the conditions under which all workers must work.

To the extent that an employer's ability to exploit his workers constitutes a significant reason for the existence of a marginal economy which acts as a magnet for unauthorized entry, policing employer behavior with respect to working conditions, wages and hours, or allowing union organization to police it, will inhibit the viability of this "pull" factor.

VIII. COST

It may well be argued that such efforts will require more resources than are available for them. We note, in response, that successful employer sanctions schemes would demand considerable resources for recordkeeping and enforcement. We note also that the establishment of a totally new system would entail startup costs, whereas what we propose requires an extension only of present operating costs. We note also that the enforcement of existing laws regulating work conditions and terms would be tailored to the real violators of our policy against employment of undocumented workers, i.e. those who employ them for reasons of profit. Such enforcement would also yield incidental benefits for health and purchasing power without entailing the social costs presented by employer sanctions. In view of the similar practical difficulties presented by the enforcement of sanctions and the enforcement of workplace protections, the balance is clearly better struck in favor of the latter.

IX. PROPOSALS TO THE SELECT COMMISSION

We believe that, given the present state of knowledge and analysis, there are compelling reasons for refraining from recommending an employer sanctions law to Congress. While we are not presently qualified to adopt a position on the necessity for stringent measures to curtail unauthorized entry and employment, we are aware of the widespread sentiment in favor of some such measures. However, given what is presently known, we do not believe that employer sanctions are appropriate means for accomplishing the desired ends. We have proposed alternative means above.

The rationale for our position is as follows. We have detailed at length our concerns about the risk of discrimination posed by the scheme. We also summarize above some threats to essential civil liberties and personal autonomy. Clearly, such risks should not be undertaken without both a compelling necessity for and a reasonable expectation that the scheme will indeed yield the desired and expected outcome. There has yet been no such showing. */

We believe that there are significant doubts about whether employer sanctions are necessary to curtail illegal employment. There are also significant doubts about how effectively an employer sanctions scheme can or will be enforced. We do not believe that such an equivocal record justifies the entertainment of serious risks to equal employment opportunity and to civil liberties. In view of the equally compelling social interests implicated in such a scheme and the extremely delicate balance between them, it is important to exercise care in considering its desirability. There should be no mistake about the impact of an employer sanctions scheme on American life. The mechanisms required for effective enforcement of such a scheme will have more than a marginal effect on our society. Not only will any such scheme raise concerns about discrimination and civil liberties, but will do so in the context of one of the most significant areas of an individual's life, employment.

While these effects will vary with the particular scheme used, there can be no question that any such scheme will bring the government into aspects of the individual's life hitherto impermeable to such intervention. While the regulation of the employment relation-

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*/ Indeed, Vernon Briggs, Professor of Industrial and Labor Relations at Cornell University and a leading scholar and proponent of employer sanctions, has stated that

> Candidly speaking, one must say that the enactment of a law against employment of illegal aliens will not accomplish much.

Briggs, The Quest for an Enforceable Immigration Policy, Employment and Training, Fall 1979, Pg. 385, 393.

ship to ensure minimum standards for workers and peaceful and effective dispute-resolution is a commonplace of our law, employer sanctions will be concerned with something more than such incidental aspects of the relationship. In order to be enforceable, a sanctions scheme will inevitably allow government to determine who may or may not work. One may legitimately be concerned about the susceptibility of such a scheme to abuse by government officials. The obtaining and proving of authorization to work will become additional considerations in decisions to relocate and to seek or change jobs, inhibiting the mobility of domestic labor.

Clearly, any such scheme must promise to be effective in accomplishing its central purposes. If it is not, then we as a society will have paid a social price for a scheme which not only does not work but which may, in its very ineffectiveness, have created problems of its own. One may contemplate a situation where, if "push" factors remain strong enough, employer sanctions will have failed to curb the flow of unauthorized workers, but will, to some extent, have hampered employment opportunities for them. One clearly needs some reassurance that such an outcome, with all the dangers that the existence of such a marginal population would pose for the public health, order and welfare, will not come about. In order to be so reassured, one needs greater certainty than is presently available about the appropriateness of employer sanctions as a tool of immigration policy.

The Institute for Public Representation proposes, in the light of the above considerations that

1) The Select Commission refrain from recommending an employer sanctions law to Congress and the President;

2) The Commission transmit to Congress and the President its sense that the concerns detailed above suggest that such a law would, on the present record, be ill-advised;

3) The Commission should recommend to Congress and the President the expansion and enhanced enforcement of laws which protect efforts at labor organization. Specifically the Commission should recommend that Section 2(3) of the National Labor Relations Act (29 U.S.C. § 152(3)) be amended so as to extend its protections to the agricultural and domestic sectors. The impact of agricultural labor practices upon interstate commerce has been recognized in § 2 of the Farm Labor Contractor Registration Act (7 U.S.C. § 2041);

4) The Immigration and Nationality Act should be amended to prohibit the Immigration and Naturalization Service from acting upon complaints about undocumented workers from employers who are faced with union organizing drives or complaints about terms and conditions of work;

5) The Commission should recommend to Congress and the President the enhanced enforcement of the Fair Labor Standards Act and the Occupational Safety and Health Act. These should be seen not only as a way of protecting the welfare of individual workers but also as a way of altering the structural bases of the unemployment of American workers, with all its attendant social ill-effects;

6) Section 6 of the Federal Farm Labor Contractor Registration Act (7 U.S.C. § 2045), providing for disclosure and recordkeeping in

connection with the terms and conditions of employment, should be more rigorously enforced as a deterrent to the depression of living standards resulting from the deliberate exploitative acts of some farm labor contractors;

7) Section 5(b)(6) of the Federal Farm Labor Contractor Registration Act (7 U.S. C. § 2044(b)(6)), providing for refusal of a certificate to contractors hiring violators of the immigration laws should be more vigorously enforced for the same reasons;

8) The Commission should recommend the creation of a task force to carry out the detection, investigation, apprehension and prosecution of "coyotes" or alien-smugglers. Such a task force should be composed of INS personnel, Federal investigators, and authropologists and social workers who are familiar with the social matrix of the origins and destinations of aliens who seek to enter in this way. The United States Government should enter into co-operative arrangements with the Canadian and Mexican governments to facilitate the carrying out of police operations against coyotes; and

9) The Commission should recommend a thorough revaluation of our foreign aid and investment policies. These policies should be redesigned to create the economic conditions for autonomous development of the source countries.

Whatever its recommendations, the Commission should specifically refer to the following concerns:

1) There is a high likelihood that employers will, in the absence of a system of worker identification, protect themselves from liability by denying employment to members of certain minorities;

2) The systems of worker identification which have hitherto been proposed either require an employer to exercise discretion in scrutinizing a job applicant and his identification or do not. In that they do, they provide either a pretext to discriminate, or an incentive to do so in order to avoid liability. In that they do not they are either impossible to enforce effectively or require stringent recordkeeping and detailed centralized information storage and retrieval which raises civil liberties concerns;

3) There is some likelihood that, in the determination and certification of the right to work, there will be particular placed upon people who, by virtue of their economically or socially marginal status, do not possess the full range of documentary proof; and

4) The introduction of any system of employer sanctions will create an adverse climate for all members of certain ethnic and racial minorities. It will do this by creating a climate of opinion which disfavors the employment of "foreigners" (in the context of a lack of sophistication about distinctions between various kind of "alien" status). It will also provide a further pretext for extra scrutiny and harassment of Hispanics, Asians, Blacks and others by both INS enforcement officials and by local police.

In conclusion, any such scheme raises serious concerns about civil liberties and equal employment opportunity. The primacy of these values in our society demands no less than that they be constantly borne in mind and that lawmakers be scrupulous to preserve them even as they attempt to deal with pressing social and economic problems.

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Illegal Immigration: An Alternative Perspective

A Critical Analysis of the Select Commission on Immigration and Refugee Policy's Recommendations for Preventing the Immigration and Employment of Undocumented Aliens.

The Institute for Public Representation is a public interest law firm affiliated with the Georgetown University Law Center. It has carried out analysis and advocacy in the areas of immigration, administrative procedure reform, civil rights, the administration of the courts and the legal profession, and corporate responsibility. It is particularly committed to fostering rational and well-informed decisionmaking at all levels, and to the preservation of civil rights, civil liberties, and economic opportunity and security. These concerns establish the perspective from which the Institute has undertaken this analysis of current proposals for preventing the immigration of undocumented aliens into the United States. The analysis was prepared as part of a thorough study of immigration and refugee issues undertaken by the National Forum on Immigration and Refugee Policy, in which the Institute is a participant.

Illegal Immigration: An Alternative Perspective.

Summary

Much of the current discussion of immigration issues in the United States has focused on the need to devise new enforcement procedures as a means of deterring illegal immigration. Such an approach to illegal immigration, which emphasizes enforcement options rather than a systematic approach which would consider the economic and social determinants of pressures to migrate, is fundamentally flawed. There are limits to the extent to which a complex international phenomenon is susceptible to purely domestic solutions. Moreover, enforcement mechanisms are unlikely to be successful in preventing illegal immigration and its consequences. Further, they will also certainly impose high financial and social costs and therefore must be rejected because they are not cost-effective.

The proposal of legislation to make the hiring of undocumented aliens illegal ("employer sanctions") rests upon inadequately examined assumptions about the nature and extent of the impact of illegal immigration upon American society and upon a simplistic notion of the causes of this illegal immigration. There is therefore no assurance that employer sanctions will have the intended results. Rather than having any beneficial effect, such legislation is likely to exacerbate existing social problems, such as employment discrimination and the existence of an "under-class" of persons who suffer exploitation and ill health and who

may add to public assistance costs or resort to crime. Such legislation also threatens to create significant new strictures upon the mobility of labor, the autonomy of employers and employees, and the civil liberties of all citizens.

Employer sanctions legislation will also impose substantial new financial costs upon government and upon employers. The cost to the government of attempting to enforce such legislation will be substantial, even though there are considerable reasons for believing that it cannot and will not be effectively enforced. Employers will be required to spend considerable time and money complying with the reporting, record-keeping and monitoring which will inevitably be imposed upon them.

This paper examines employer sanctions, as well as the other options which have recently been proposed. The detailed analysis which follows the introductory overview (see Section II) explores the successes and limitations of a pilot Department of Labor program to enforce protective labor legislation as a means of curbing illegal immigration and its social consequences. We conclude that such a program, if expanded and modified to improve effectiveness and reduce discrimination, offers one effective approach to mitigating some of the adverse consequences of illegal immigration. Such an approach does not threaten to foster discrimination against members of racial or ethnic minorities. Indeed, in addition to being an effective instrument of immigration policy, it will benefit all American workers. It deserves more emphasis than it has been accorded in discussions of the subject.

The analysis then considers (see Section III) past and present experience with the enforcement of immigration laws, and the contribution that an enhanced border and interior enforcement program can make to the prevention of illegal immigration. We conclude that such a program may not add significantly to the prevention of illegal immigration. It is, however, likely to exacerbate the already serious violations by INS of the civil rights of all Hispanic persons, regardless of their immigration status. The resulting antagonism between INS officers and Hispanic communities is likely to hinder, rather than help, efforts to curb illegal immigration.

The analysis concludes with an extensive examination of the likely deleterious effects (Section IV A) and the likely ineffectiveness (Section IV B) of employer sanctions legislation. This examination considers the various legal and administrative mechanisms which have been proposed for implementing employer sanctions legislation and finds that none of them will mitigate the fundamental flaws of such legislation.

We have concluded that it is necessary to devise an alternative approach to illegal immigration which will be more effective and impose fewer financial and social costs. Immigration into the United States must be viewed as an international phenomenon, affected at least in part by political, social and economic factors. United States foreign policies and investment policies of United States firms have considerable influence over the persistence and development of such factors. Domestically, the emphasis must shift to preventing the ill-effects of illegal immigration rather than such immigration itself. The enforcement of protective labor laws will accomplish this and also remove the economic incentive to employers to hire undocumented workers. This is the only one of the options previously considered which promises both to be effective and to avoid endangering fundamental social values. It has great potential as an essential component of an effective and socially acceptable approach to the problem of illegal immigration.

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I. AN OVERVIEW OF THE PROBLEM

The Select Commission on Immigration and Refugee Policy has identified the issue of "undocumented/illegal migration" as the "most pressing" it considered during its deliberations, and concluded that most citizens believe such migration must be stopped. The Select Commission has therefore proposed, in broad and unspecific terms, (1) increased enforcement of existing labor laws; (2) increased enforcement of existing immigration laws; and (3) most significantly, a new statute making it illegal for an employer to hire an undocumented alien (generally referred to as "employer sanctions" legislation). These employer sanctions are to be accompanied by an unspecified system of national identification for employment purposes.

After careful consideration, we have concluded that the Select Commission's recommendations fail to address critical questions about the likely cost and the likely effectiveness of a scheme which emphasizes regulation of individual employment transactions rather than a systematic attack on the social and economic determinants of migration:

> --With respect to costs, we believe that the Commission's recommendations will result in a cumbersome and pervasive regulatory scheme which will cost billions of dollars and impose substantial regulatory burdens on employers. They will also pose dangers to social order, community health, civil rights and civil liberties.

--With respect to effectiveness, there is no assurance the Commission's proposals will actually provide the results sought. Further research and thought must be devoted to the analysis of undocumented migration, its characteristics and its dynamics. The effect of illegal immigration on U.S. society must be described with greater specificity and exactitude, so that an effective and precisely tailored deterrent to it may be devised.

In sum, there must be fuller evaluation of the relative effectiveness and the relative costs, both social and financial, of immigration enforcement, of employer sanctions and of enforcement of labor laws. On the present record, the increased enforcement of labor laws is the only one of the Commission's recommendations that promises to be effective and to avoid endangering important social values.

While increased enforcement of labor laws will not solve all the social problems which illegal immigration gives rise to, it may be more effective and have a more central role to play than the Select Commission seems to have appreciated. Indeed, there is little indication of efforts by the Commission and its staff to establish precisely how effective an instrument of policy this might be. Since, as is argued below, employer sanctions legislation is likely to be ineffective and to impose heavy social and financial costs, both the enforcement of labor laws and the re-evaluation of foreign aid and development policies must be more fully explored as policy options. This exploration must take place alongside a fuller and better-informed consideration of illegal immigration and its causes and effects, so that effective and acceptable alternatives may be devised to accompany labor law enforcement and international initiatives in a comprehensive approach.

A. Will The Commission's Recommendations Be Effective?

(1) Do the Recommendations Adequately Identify the Problem?

The Commission has failed to specify in detail what it considers to be "the problem" associated with undocumented immigration. While the Commission's Final Report lists a series of problems which may be associated with undocumented migration, such as the impact on social services, job displacement, wage depression, and the potentially adverse effects on U.S. society of an exploitable underclass of persons fearing apprehension, it fails to state precisely which of these problems its recommendations are intended to resolve. Without a clearer sense of what the various aspects of the problem are, it is impossible to think about what types of measures will effectively meet it.

(a) Employment and Wages

While the Commission correctly discounts the impact of undocumented immigration on social service costs,[1] it recognizes that there are two other types of possible negative economic impact from undocumented immigration. One is direct displacement of legal workers. The other is the depression of wages by undocumented workers who, for a variety of reasons, will arguably work for less. The Commission's treatment of these issues is superficial and inconclusive. Research in this area has not produced enough data to form the basis of a meaningful and informed judgment on whether undocumented workers displace American workers and, if so, in what sectors.[2] The Commission concedes that economists specializing in these questions continue to disagree about whether illegal immigration causes either job-displacement or wage depression, or both. Without determining the costs, in this respect, of undocumented immigration, it is impossible to project whether any enforcement scheme is likely to be cost-effective. Particularly necessary to such a determination is information concerning the extent of such repercussions from illegal immigration. The most that the Commission can say is that some workers have been displaced and some wages depressed as a result of illegal immigration of workers. This is an extremely tentative foundation upon which to justify an expensive and intrusive enforcement scheme like employer sanctions.

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[1] Indeed, research suggests a positive contribution by undocumented workers. _See_ Los Angeles County Chief Administrative Officer, _Tax Effort and Service Cost of Illegal Aliens_, (March 1975); San Diego County Human Resources Agency, _A Study of the Socio-Economic Impact of Illegal Aliens on the County of San Diego_, (January 1977); D. North & M. Houston, _The Characteristics and Role of Illegal Aliens: An Exploratory Study_, Department of Labor.

Furthermore, the type of enforcement schemes which are proposed must be shown to be precisely responsive to the specific economic problems created by undocumented immigration. Nowhere has the Select Commission established, or even hypothesized, the relative importance of direct job displacement and wage depression. It has not inquired into what proportion of the undocumented population works under conditions and wages competitive with legal workers and what proportion works for less. It has instead devised a general enforcement package which is apparently intended to deal with both problems.

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[2] Supplemental statement of Commissioner Elizabeth Holtzman, Appendix B at 341. U.S. Immigration Policy and the National Interest, Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy, March 1, 1981 (hereinafter cited as Final Report).

The inadequacy of such an approach is readily apparent, since the wage depressing effect of illegal immigration suggests different solutions from those suggested by direct job displacement. The Commission proposes a heavy emphasis on employer sanctions and a subordinate emphasis on enforcement of labor laws. However, were it to be determined that a substantial proportion of the undocumented population is composed of aliens who are employed at less than minimum wage or in illegal working conditions, then it would be necessary to shift some emphasis to the enforcement of labor laws. This is because one more legal penalty, in the form of employer sanctions, in addition to those which a violator of labor laws already risks daily, will have an uncertain and incomplete effect. It will increase an employer's risk by an increment that will be balanced against calculations about the economic costs of compliance. The more vigorous enforcement of labor laws, exemplified in the Department of Labor's Employers of Undocumented Workers Program, will, however, be more precisely tailored to deterring the employment of undocumented workers under conditions and wages which have negative social effects. Since such enforcement will impose on an employer the costs which he seeks to avoid by violation of the laws, his incentive to hire undocumented workers will be significantly reduced.[3]

It must be conceded that employer sanctions will be effective to some extent in deterring the employment of those undocumented aliens who work under conditions identical to those of legal workers. However, unless this section of the undocumented population is truly substantial, employer sanctions may represent an overbroad and costly solution.

There is, finally, a total failure in the Final Report to consider the factors which may account for the hiring of undocumented workers when the employer does not intend to exploit them by paying illegally low wages. Further consideration is needed of the extent to which such factors will prevail, in an employer's business judgment, over the duties imposed by an employer sanctions law.

(b) The "Underclass" Problem

Unable to establish the effects of illegal immigration on the labor market, the Commission concludes that nevertheless, large scale undocumented immigration causes harm by encouraging the development of an "underclass". The Commission plausibly reasons that the existence of such an underclass has pernicious effects on U.S. society by breeding disregard for immigration and labor laws and leading to the exploitation of its members. However, there is a serious risk that the Commission's proposals will not only not eliminate such an underclass, but will actually expand it.

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[3] This option is described below in Section II.

The Select Commission's recommendation of employer sanctions is premised on the assumption that undocumented immigrants are attracted to this country by job opportunities. Therefore, reasons the Commission, the penalizing of employers who provide job opportunities will effectively deter such immigration. However, as indicated by a range of research on the question,[4/] this is a dangerously one-dimensional analysis of the dynamics of international migration.

Research suggests that economic incentives for migration also arise from the lack of economic opportunity at the source of migration. This "push" factor will often work regardless of the availability of jobs at the migrant's destination. (This is certainly apparent in the migration from countryside to city within developing countries). Thus, even if job opportunity in the U.S. were to be totally closed to undocumented immigrants, one could expect illegal immigration to continue.

4/ *See*, *e.g.*, Appendices to *Testimony of American Friends Service Committee to the Select Commission*, San Francisco, June 1980; Milton Morris & Albert Mayio, *Illegal Immigration & U.S. Foreign Policy*, Department of Labor, Oct. 1980.

Illegal immigration will also continue because of "pull" factors in the U.S. which are unrelated to job opportunities. Quasi-economic incentives to migrate are found in the social and standard-of-living benefits of life in the U.S. which an undocumented worker will perceive. To one fleeing landlessness or bare subsistence in a third world village or city, even a marginal existence in the United States will pose an attractive alternative. One must also reckon with the impulses provided by family ties which induce illegal immigration and provide, along with cultural organizations, an expectation of aid and comfort in confronting an unwelcoming society.[5/] If any of these factors is important in encouraging continued illegal immigration, then it is necessary to reassess the Commission's claim that its proposal will eliminate an "underclass" of undocumented workers. If employer sanctions are successful in closing off a significant portion of the job market,

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5/ Studies of such "push" and "pull" factors have just begun in Mexico in some of the source-places of migration to the United States. These studies, to be conducted under government auspices, should establish much more clearly than the Select Commission's speculations the causes of migration from Mexico.

Some information is already available which suggests that inability to find employment will not be a dispositive factor in decisions about whether to migrate. See Stanley L. Friedlander, Labor, Migration, and Economic Growth, (Cambridge, Mass.: MIT Press, 1965), which notes that higher unemployment in the United States (and particularly New York, the actual destination) than in Puerto Rico, occupation by occupation, did not deter migration. "The Puerto Rican migrants seem to be moving not in response to employment opportunities ... in fact, they are moving to worse employment opportunities ... but in response to significantly greater absolute and relative earning differentials from prospective jobs." Friedlander, supra. Page 128.

but unsuccessful in controlling illegal immigration, the presence of an unemployable population will have either or both of the following effects: 1) An outlaw economy will develop, rife with abuses, exploitation and violations of labor laws, as lawless enterpreneurs aspire to a high return on investment to compensate them for the risks of hiring undocumented workers; 2) The bulk of the unemployable population will turn into a pariah population deprived of legitimate jobs, with little recourse but crime or delinquency and with no way to maintain its health and other social welfare. This population will include not only new arrivals, but also the 40% of the undocumented aliens already in the U.S. which the Commission estimates will be excluded if its legalization program is based on a two year residency requirement. The disastrous effects of this on general social order and community health are apparent.[6] Thus, employer sanctions will threaten the creation of precisely the "underclass" which the Commission proposes to eliminate.

(2) Will the Recommendations Work?

Even if the Commission's recommendations were carefully tailored to address particular problems associated with illegal immigration, there remains a serious question about the practical viability of those recommendations.

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[6] The problem will be further aggravated if, as has been proposed in some quarters, the legalization program is not implemented until employer sanctions are effectively in place.

(a) Employer Sanctions

There is considerable question about how effectively an employer sanctions scheme of the kind proposed by the Commission can be enforced. Much of this uncertainty arises because of the lack of specificity in the Commission's recommendations. For example, they do not clearly recommend a standard of liability for the employer. Assuming that the standard of liability will be "knowing employment of an undocumented alien", it is not clear what will constitute a showing of knowledge. It is also unclear whether only civil penalties will be imposed, or whether these will be accompanied by criminal penalties in egregious cases. Finally, the Commission makes no precise recommendations on the nature of an ID system to establish eligibility for employment.

Yet these are precisely the kinds of details which will determine the effectiveness (and the costs to social values) of any employer sanctions scheme. Without such details, it is impossible to determine how the sanctions proposal would be enforced. For example, the Commission suggests targeting larger businesses for enforcement efforts. However, it makes no attempt to show that this would be an effective targeting of enforcement resources. Similarly, the Commission failed to consider whether, in criminal prosecutions, one may expect overburdened U.S. Attorneys to exercise considerable prosecutorial discretion in decisions about when and whom to prosecute. The effect of this factor on the scheme's effectiveness may well be radical. It is also important to consider how juries will behave if criminal sanctions are imposed. It is certainly possible that local sentiment in communities with a history of or perceived need for employing undocumented workers will result in an unwarranted proportion of acquittals. This would have a critical effect on the actual success of employer sanctions.

If a system of graded civil penalties is to be relied upon for effective enforcement of employer sanctions, then it is necessary to look at the capacity of regulatory agencies to sustain such an effort. There is simply no practical consideration in the Commission's Report of how much civil enforcement will be necessary to effectively deter lawbreakers, and of the effect of such an effort on the other duties of the agencies concerned and on their budgets.

Finally, one must ask what likelihood there is that employer sanctions will, rather than deterring employment of undocumented workers, be internalized as a business cost, to be passed on to the consumer in the form of higher prices or to the worker in the form of lower wages. It seems likely that any but an extremely harsh penalty will be so internalized, particularly by those who regularly hire undocumented workers for reasons of profit. On the other hand, if sufficiently harsh penalties are adopted, they will necessitate expensive enforcement efforts in pursuit of a scheme whose effectiveness and value remain uncertain.

(b) Border Enforcement

The Select Commission has also recommended increased conventional enforcement accompanied by training programs and safeguards to diminish the instances of violations of the civil rights of legal residents. While we applaud the suggestion that structural changes be made which will decrease the frustration level and increase the sensitivity of border patrol officers, we believe that the Commission's analysis perpetuates the mistakes which underlie the failures of present policies.

There is cause for concern that increased border enforcement will in practice mean militarization of the border enforcement effort. This has and will result in serious violations of the civil rights of Hispanics living in the border area. Further, it is likely to contribute to the adversary perceptions of both INS and the border Hispanic communities. It will thus hinder, rather than help, the effort to establish an effective and influential presence in these communities. Thus, militarization of the border enforcement effort will endanger whatever gains may be expected from improved training for INS officers.

There remain fundamental questions about how effective border enforcement can be, and about how important a role it should have in the attempt to inhibit illegal immigration. We note that many continue to risk apprehension depite increased obstacles. It is also axiomatic that the length of our land boundaries presents particular problems. Most critical, however, is the fact that economic and social factors, quite unrelated to the difficulties of entry, continue to encourage migration. It is therefore imperative that the purposes of border enforcement be more exactly delineated, and that there be no increase in its level until its effectiveness is established.[7]

B. What Are The Costs of Proposed Enforcement Methods?

The Commission has not only failed to evaluate fully the claimed benefits of an employer sanctions scheme, it has also failed to fully consider the costs of such a scheme. These costs are social as well as financial. The Select Commission's recommendations will endanger civil rights, civil liberties, and the autonomy of both employers and employees.

(1) Financial Costs

There is total uncertainty about the financial costs to the government of any of the enforcement options proposed by the Commission. This is particularly so of employer sanctions, since there are no similar existing programs which may be used as a basis for projection. It is quite unclear what will have to be spent to establish a secure and nondiscriminatory ID system, or what will be necessary to effectively enforce employer sanctions. One may hypothesize that the more secure the ID system and the more effective the enforcement mechanism, the greater will be the cost.

The Select Commission has failed to consider the relative costs of each option in deciding the relative importance to be accorded each one. There is no indication of any disciplined attempt to establish the value for money promised by any one proposal. The Commission's Report also lacks any consideration of the costs to employers of compliance with the regulatory scheme. A nationwide scheme such as employer sanctions will inevitably impose pervasive costs on the national economy. Such costs must be established with exactitude or with reliable methods of projection if the cost-effectiveness of employer sanctions is to be determined.[8/]

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[7] The border enforcement option is discussed below in Section III.

(2) Social Costs

The costs in harassment and abuse of increased border enforcement have been broached above and are discussed below in Section III. The Select Commission also recommends legislation which would prohibit employers from hiring any worker who did not, in some (unspecified) way, prove that he was authorized to work in the U.S. In the form proposed by the Commission, such legislation is likely to have adverse effects on equal employment opportunity, on the mobility of labor, on the autonomy of employers and employees, on the civil liberties of all citizens, and on social order and community health.

[8/] While it might have been difficult to establish definite figures on cost, even a consideration of rough estimates should have occasioned caution. The lowest estimate, prepared by the Commission's staff, of the cost for an I.D. card system alone is $100 million in start-up costs and an annual cost of $180 to $230 million. A 1978 estimate, prepared by a consultant to the Commission and based upon the costs of the new secure alien registration card, estimated the start-up cost at $400 million. Each of these has been widely criticized as a gross under-estimate. The cost of a data bank is estimated at $87 million in start-up costs and annual costs starting at $500 million and reduced over 6 years to $200 million. This, of course, does not include collateral enforcement costs, which must be substantial in order for employer sanctions to be effective. By contrast, the 1981 budget for the entire wage and hour enforcement program of the Department of Labor, was $65,642,000.

(a) Employment Discrimination

As discussed below in Section IV, employer sanctions legislation will create widespread employment discrimination. The lack of specificity in the recommendations about the standard of liability to be imposed on employers raises great concern. An employer may attempt to protect himself from such liability by refusing to hire anyone who "might be foreign". This will clearly result in widespread discrimination against minority citizens and permanent resident aliens of "foreign" (e.g. Hispanic or Asian) appearance. Even if the standard of liability were more strictly defined, it is not clear that employers, lacking legal sophistication, would be able to distinguish acts which carry liability from those that do not, or among the varieties of possible work authorization status. Thus, an employer, faced with a permanent resident alien, might mistakenly deny him employment on the understanding that "aliens" may not be hired.

In order to protect employers and employees alike from such uncertainties or mistakes, the Select Commission has recommended that some system of identification be provided for hiring purposes. Unfortunately, the Commission fails to recommend any particular system. Furthermore, the options which it presents are not described in any detail.

We believe that none of the schemes for ID systems which were designed or considered by the staff of the Select Commission provide adequate safeguards against discrimination.[9/] In addition to these concerns regarding potential discrimination by employers, there is also cause for concern about whether the criteria for enrollment in an ID system and for reissuance of lost documents allow equal access for minorities, legally resident aliens and economically marginal individuals. It is also likely that the procedures for verifying authority to work will subject minorities and legally resident aliens to extra scrutiny or delay in hiring.[10/]

(b) Mobility of Labor

For both employers and employees, an employer sanctions system will introduce new burdens on the formation of the employment contract. Such burdens will inhibit the mobility of labor to an indeterminate extent. This will particularly be the case if the procedure for enrollment or verification for work authorization is subject to technological or bureaucratic inefficiency, or if minority persons begin to view the hiring process as part of a system which subjects them to special scrutiny because of their appearance.

9/ *See* discussion at § IV A. below. *See also* *Discriminatory Effects of Employer Sanctions Proposals* Institute for Public Representation, Georgetown University Law Center, (December 1980), submitted to the Select Commission on Immigration and Refugee Policy.

10/ *Id.*

(c) Autonomy of Employers

Employer sanctions systems not only impose regulatory costs on an employer in pursuit of an uncertain economic "benefit." They also interfere with fundamental business decisions about how, whom and when to hire. Any scheme which substitutes abstract regulatory considerations in the hiring decision for more knowledgeable and business-related considerations must be carefully scrutinized This particular scheme is a novel imposition on businessmen, unprecedented in scope, and quite unlike the strictures on business autonomy which are now widely accepted.

(d) Autonomy of Employees

The Commission fails to consider the implications of a system which will delegate government enforcement functions to private parties, and which will grant employers substantial new powers over those applying for jobs. In this sense the employer sanctions system will institutionalize pre-employment inquiries into non-job-related factors, thus reversing a decade of efforts to eradicate such inquiries from hiring decisions.

There remains also a substantial question about the effect that employer sanctions legislation will have upon labor unions. Pre-employment inquiries might well form the basis of discrimination on the basis of union sympathies. Moreover, such legislation may implicitly impose upon labor unions the corollary duty to screen applicants for membership in the union or members whom the union might refer to employers for jobs.

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(e) Civil Liberties

It is unfortunately true that the more effective and less discriminatory any system of identification is, the more of a threat it poses to civil liberties. The storage and retrieval of information in a national data bank raises concerns, particularly since its function is to regulate the employment relationship. Since work is essential to the enjoyment of any substantial social goods, one must be wary of allowing government to determine who may and may not work. If the universal identifier is to be a card, then one must fear harassment by local police officers who will selectively demand that it be produced, much as they demand alien registration cards from Hispanic citizens in many localities today.

(f) Social Order & Community Health

As explained above, if employer sanctions do not succeed in deterring virtually all illegal immigration, they will result in the creation of a jobless population of alien persons, excluded from society and economic opportunity. The Commission has not considered the potential economic and social costs of such a result.

C. Alternative Approaches

In our view, the Commission has recommended employer sanctions without fully considering either the potential benefits or the potential costs of such a system. We also believe the Commission has not fully explored alternative approaches, which may offer significant advantages with few of the other risks outlined above.

(1) The International Dimension

The Commission has placed a heavy emphasis on domestic policy options as instruments for the control of international migration.[11] However, its recommendations fail to consider adequately the effects of the proposed enforcement procedures on the international dimensions of the U.S. national interest. They also ignore the ways in which foreign policy might be used to accomplish domestic policy objectives.

There are two facets of the national interest which are affected by the Commission's proposals. One is the interest in orderly and predictable migration, so that the United States may rationally plan the incorporation of immigrants into American society and avoid disruptive social consequences. The other is the national interest in fostering economic development in the sending countries and thereby maintaining the political viability of regimes friendly to United States interests.

Both the interest in orderly and predictable migration and the interest in the political stability of allies are best served by the encouragement of social and economic stability in the sending countries. Should the enforcement scheme proposed by the Select Commission succeed in inhibiting migration into the United States, it will do nothing to alter the economic conditions which had compelled such migration. This will either exacerbate social problems in the rural sources of such migration, or will divert the stream of destitute rural migrants to the urban centers of the sending countries.[12] Each of these outcomes will inevitably lead to general social and political instability. This will be inimical to the interests of the United States in two ways. First, social and political instability, particularly in the countries of this hemisphere, has repeatedly led to difficult to manage, unpredictable mass influxes of persons fleeing such instability. Second, creation of such instability also threatens international order and the political viability of regimes friendly to the United States. In effect, the expenditure of funds on the Commission's enforcement package will necessitate further expenditures on the processing and control of, and provision of services to, mass migrations of impoverished persons coming to the U.S., and on the provision of aid to allies for the policing of violatile and unstable societies. This is simply not cost-effective policymaking.

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[11] This is particularly puzzling since the Commission's Final Report expresses serious doubts about the viability of domestic policy as a means for controlling international migration. Final Report at 20.

A more cost-effective approach to these questions is available, and should have been accorded more importance by the Commission than it was. While U.S. aid policy has undergone considerable improvement in this respect in the last decade, criticism continues to be leveled at both it and private investment policies. The substance of the criticism is that these policies look at the abstract indicia of development and profit, but insufficiently emphasize the creation of employment and other economic opportunities for the masses of the sending countries. The United States must begin to look at ways to make policy on foreign aid and private investment so as to foster employment and broad social development.

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[12] See "Migration of Mexican Campesinos", Appendix G, Testimony of the American Friends Service Committee to the Select Commission, San Francisco, June 1980.

While such a re-evaluation of aid and investment policy would certainly entail some costs, these would yield a triple benefit. First, broad social development would remove one of the major inducements to migrate to more prosperous societies like the United States. Second, it would avoid the dramatic social dislocations which cause mass migrations, which in turn impose substantial emergency costs on the United States and state and local governments. Finally, one may expect expenditures in aid and investment to substitute for at least some of the military expenditures which might be expected if social and economic instability lead to political discontent in the sending countries.

Thus, in contrast to the Commission's recommendations on enforcement, which promise to require further expenditures to mitigate their incidental effects, a carefully designed aid and investment policy will both further the United States national interest and the welfare of the masses of the sending countries. Relative prosperity and stability in the sending countries are likely also to contribute to the health and predictability of bilateral trade relations between sending countries and the United States. While the Select Commission formally endorsed such an approach,[13] it failed to accord it the importance that it deserves as a cost-effective instrument of both immigration and foreign policy.

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[13] Final Report at 31.

(2) Enforcement of Existing Labor Laws

The discussion above of economic factors suggests that the enforcement of current labor laws is likely to mitigate the adverse social effects of employment of undocumented workers at or below minimum legal conditions and wages. It will also remove the employer's incentive to hire undocumented workers, and thereby restrict the availability of jobs to them. If undocumented workers who work at or below minimum legal conditions and wages are a significant proportion of the total undocumented population, then enforcement of labor laws may deserve a more important role in any enforcement scheme than the Commission has allowed. However, it is important that the several changes be made in labor law enforcement practices in order to ensure the effectiveness of this approach and to avoid fostering discriminatory employment and enforcement practices. This option is explored more fully in the discussion which follows.

II. THE SELECT COMMISSION'S RECOMMENDATION THAT ENFORCEMENT OF EXISTING LABOR LAWS BE INCREASED

The Select Commission is recommending that enforcement of existing wage and working standard legislation be increased,[1] but views this program as merely a supplement to the employer sanctions legislation it is recommending.[2] However, it is possible that a program for increasing enforcement of existing labor laws could accomplish many of the purposes of employer sanctions legislation, at less cost. It therefore deserves careful consideration as one important component of a viable approach to illegal immigration which does not rely upon employer sanctions.

A properly administered program for increased labor law enforcement could be effective in achieving two of the basic goals of an employer sanctions system; i.e., preventing depression of wages and working conditions, and helping to prevent undocumented workers from displacing those legally entitled to work. The former effect would be achieved, of course, through direct enforcement efforts. The second effect, preventing displacement of those legally entitled to work, would be achieved indirectly in two ways. First, if employers are forced to provide undocumented workers with the same wages and working conditions that must be provided to

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1/ Final Report at 70.

2/ *See id*.

those legally entitled to work, employers who currently hire undocumented workers because they will work for less than minimum wages and under less than legally adequate working conditions will no longer have any financial incentive to hire undocumented workers. Second, once the financial incentive to hire undocumented workers has been removed, employers will have little to gain from protecting their employees from effective enforcement of immigration laws. They may, therefore, be more willing to cooperate voluntarily with immigration officers. For example, they may give INS officers permission to make warrantless searches of their business establishments to apprehend undocumented aliens. In light of the great difficulty that the INS has in obtaining warrants, (see § IV B, infra), this would greatly increase the effectiveness of enforcement of existing immigration laws in the work place, and therefore help to prevent displacement of those legally entitled to work. Because of the potential that increased labor law enforcement has for preventing depression of wages and working conditions and helping to prevent displacement of those legally entitled to work, it should seriously be considered as an alternative to employer sanctions legislation.

A. Current Use of Labor Law Enforcement to Curb Employment of Undocumented Aliens

Since July, 1978, the Department of Labor has operated the Employers of Undocumented Workers Program (EUW), which is designed to use labor law enforcement to curb employment of undocumented aliens. Under this program, 260 additional personnel, including 225 compliance officers, were authorized to enforce the Fair Labor

Standards Act and the Federal Farm Labor Contractors Registration Act with a special emphasis on investigations of establishments in low wage, high turnover industries, which were considered most likely to hire undocumented workers. An examination of the current EUW program will be useful to an evaluation of the advisability of the Select Commission's recommendation.

(1) Criteria for Targeting Employers to be Investigated under the EUW Program

Under the EUW program, employers to be investigated are ordinarily targeted in one of three ways. The majority of investigations are done in certain types of businesses that INS has determined to be likely to employ undocumented aliens. Particular employers within the targeted type of business are selected at random.[3] The Department of Labor has organized strike force teams to investigate as many employers as possible within the targeted type of business.[4] It has completed over 1,390 strike force investigations and has found about $3.7 million in violations of wage provisions.[5]

A second method for targeting employers to be investigated is through INS leads with respect to a specific employer.[6] Investigations resulting from such specific leads, however, constitute only a small percentage of the work done under the EUW program.[7] A third method for targeting employers to be investigated is through complaints made directly to the Department of Labor alleging that a particular employer is employing undocumented aliens and underpaying them.[8] Most of these complaints come from persons held at INS detention centers,[9] because undocumented workers who have not been apprehended are generally afraid to complain.[10]

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[3] Discussion with Mr. Robert DeVore, Program Analyst of the Enforcement Division of Policy and Procedure, Wage Hour Division of the Office of Fair Labor Standards of the Department of Labor.

[4] Report to the Congress, by the Comptroller General; Administrative Changes Needed to Reduce Employment of Illegal Aliens, HRD-81-15 at 15, Jan. 30, 1981, (hereinafter cited as GAO Rep.).

[5] *Id*. at 20. The Houston strike force, for example, concentrated on the construction industry which had a reputation for using undocumented workers. It completed 242 investigations and obtained $510,624 in back wages for 2,064 employees. It is not known, however, how many of the 2,064 employees were undocumented workers. GAO Rep. at 16.

[6] Discussion with Mr. Robert DeVore.

None of these three methods of targeting employers to investigate involves any discrimination on the part of the Department of Labor against employers who employ a large number of minority employees.[11] The Department of Labor does not have information on how many minority employees a particular establishment has, so such information could not influence the Department's initial decision to investigate a particular establishment.[12] Nevertheless, one feature of the present EUW program does have a discriminatory impact. To the extent that the INS uses discriminatory criteria in targeting the employers it will investigate, such employers are more likely to be investigated by the INS.[13] It is, therefore, likely that referrals from the INS to the Department of Labor will include a disproportionately high percentage of employers who hire large numbers of minority employees. Consequently, even though the Department of Labor itself does not use discriminatory criteria in selecting employers to investigate, it may investigate a disproportionately high number of employers of minority persons.

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[7] Id.

[8] Id.

[9] See GAO Rep. at 13.

[10] Discussion with Mr. Robert DeVore.

[11] Id.

[12] Id.

[13] Id.

(2) Department of Labor Practice under the EUW Program of Making Referrals of Suspected Undocumented Aliens to INS

Under the EUW program, the Department of Labor makes referrals to the INS when a Department of Labor investigation leads investigators to suspect that undocumented aliens are being employed. There is no policy or practice of guaranteeing that the identity of complainants will not be revealed by the Department of Labor to the INS or other agencies.[14]

Generally, however, referrals of individual employees (rather than of employers) are not made to the INS. Rather, referrals will be made only with respect to a particular business establishment believed to be hiring undocumented aliens.[15] The Department of Labor has no authority, except under the Federal Farm Labor Contractors Registration Act, to determine the citizenship status of employees. The FLSA does not give the Department explicit authority to question workers about their alien status or to prohibit continued employment of undocumented workers.[16] Consequently, the Department apparently does not question workers' alien status,[17] and tries to avoid making referrals to INS with respect to specific individuals.[18] Such referrals are made only when evidence of an individual's illegal status is sufficiently conclusive.[19]

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[14] *Id.*

[15] *Id.*

(3) Effectiveness of the EUW Program in Curbing Employment of Undocumented Aliens

Although the Department of Labor's failure to make determinations of whether the employers sued for FLSA violations also employed undocumented workers makes it difficult to measure the impact of the EUW program, the most reasonable conclusion is that the program has had a significant positive effect. While the General Accounting Office (GAO) concluded that the program was unlikely to be effective, its evaluation was based on data that were misleading both because they were not collected in a random fashion and because they were collected during the initial stages of the EUW program, before the program had a chance to develop an effective method of operation. The Department of Labor believes that after it had a chance to implement additional procedures and formulate more effective policies, its undocumented worker program had a positive impact.[20]

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[16] GAO Rep. at 9.

[17] Id.

[18] Discussion with Mr. Robert DeVore.

[19] Unfortunately, there is apparently no set policy with respect to the amount or type of evidence a Department of Labor investigator should have before making a referral to the INS either with respect to a particular business establishment or with respect to a particular individual. Generally, if a business establishment investigated by the Department has a large number of employees who appear foreign and can't speak English and don't have social security numbers, there is a high likelihood that the Department of Labor will make a referral of that establishment to the INS. Similarly, an employee's admission of his illegal status would probably be sufficient, and, even in the absence of such an admission, an employee's lack of a social security number would have particularly heavy weight, especially if combined with inability to speak English, foreign appearance, etc. Discussion with Mr. Robert DeVore.

The GAO report is based on an examination of 606 undocumented worker closed case files from the initial states of the EUW program's operation. These included 191 from the pilot EUW program conducted between July 1, 1977 and Dec. 31, 1977, and 415 from the Sept. 30, 1978 to Sept. 30, 1979 fiscal year.[21] This represents 91% of the cases closed during the pilot project (18 of the 209 cases closed during this period were omitted), and 78% of the cases closed during the 1978-79 fiscal year (118 of the 533 cases closed during this period were omitted). One hundred thirty six (18%) of the 742 cases closed during the periods examined were omitted ostensibly because of the large inventory of closed cases.[22]

After considering this and additional information supplied by the INS, the GAO concluded that most undocumented workers earn at or above minimum wage and that the EUW program would therefore be unlikely to reduce illegal immigration, because employers who are complying with the labor laws would be unaffected by the program.[23]

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[20] GAO Rep. at vi; Department of Labor letter in response to the draft GAO report, Appendix I GAO Rep. at 46.

[21] GAO Rep. at 4.

[22] Id.

[23] Id. at 17.

The GAO conclusion, however, is based not upon Department of Labor data, but rather upon INS statistics which show that, except for agricultural workers, most undocumented workers apprehended by the INS are paid at or above minimum wage.[24] These statistics are misleading for two reasons.

First, INS officers concentrate on locating and arresting undocumented workers in jobs in high-wage industries that would be attractive to U.S. citizens.[25] Almost 20% of the INS cases in the GAO sample were from the INS office in the Chicago area, which admittedly concentrated its investigations against undocumented workers in high-wage industry jobs.[26] If the practice of the Chicago INS office is any example, the majority of apprehensions in other areas were also from high-wage industries.[27] It is no surprise that most undocumented workers have been found in high-wage industries when this is where the INS is looking.[28]

The second reason that the INS statistics were misleading is that the INS questioned apprehended undocumented workers only about their hourly wage.[29] It rarely made any effort to determine whether the reported wages were accurate or whether payment was made for all hours worked, and it did not collect information on overtime or government contract work.[30] Department of Labor officials, however, state that failure to pay undocumented workers proper overtime would be more likely than failure to pay proper ordinary wages, and would be more difficult to prove if employers keep erroneous or incomplete records.[31] Moreover, undocumented workers could be paid above the FLSA minimum wage and yet be paid below the wage required by government contract statutes such as the Davis-Bacon Act and the Service Contract Act.[32] In view of the fact that the INS concentrated its enforcement efforts on high wage industries, failed to verify apprehended undocumented aliens' statements that they had been receiving the minimum hourly wage, and failed to collect data on whether apprehended undocumented aliens had received proper overtime and government contract wages, the statistics it collected are too misleading to form a fair basis for the GAO's conclusion that most undocumented workers earn at or above minimum wage.

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[24] Id. at 7.

[25] Id. at 8.

[26] Id. at 19.

[27] Letter from Department of Labor; GAO Rep., Appen. 1 at 44.

[28] Id.

[29] GAO Rep. at 19.

When all of the evidence is considered, the most reasonable conclusion is the opposite of that reached by the GAO. A significant number of undocumented workers do receive less than minimum wage, and the EUW program is an effective way to reach them. Even the misleading INS statistics upon which the GAO relied reported that 21% of the undocumented workers apprehended were paid less than the minimum wage.[33] Moreover, it is likely that undocumented workers, who often have little education or English speaking ability, would most often be employed in the low-wage industries that the EUW program focuses on rather than in the high wage industries that the INS focuses on. It is, therefore, likely that much more than 21% of the undocumented workers receive less than minimum wage and would be affected by the EUW program. This conclusion is supported by the fact that many of the employees for whom the EUW program secures back wages cannot be located and do not come forward to claim their back wages. It is reasonable to conclude that these workers would have claimed the back wages awarded to them if they had not been undocumented aliens afraid of being detected.

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[30] *Id.*

[31] *Id.* at 8.

[32] *Id.* at 19.

Another problem that the GAO identified with respect to the EUW program was that, because they are afraid of being apprehended, undocumented aliens who receive less than the minimum wage would be unlikely to complain. The GAO therefore concluded that the EUW program's reliance upon complaints made it ineffective.[34] This criticism was valid during the period which the GAO was evaluating. During that period the EUW program did not make extensive use of

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[33] Letter from the Department of Labor; GAO Rep., Appendix 1 at 44.

[34] See id. at iv.

INS records to schedule FLSA investigations of companies that habitually used undocumented workers.[35] 397 of the 606 undocumented worker investigations reviewed by GAO were undertaken by the Department of Labor as a result of complaints received.[36]

Since the beginning of the period which the GAO reviewed, however, the Department of Labor's use of INS information to target employers to investigate has increased.[37] On November 6, 1979, the Department of Labor instructed compliance officers to target employers by considering (1) complaints from persons held at INS detention centers, (2) leads received from local INS offices, and (3) leads obtained from INS records at detention centers.[38] These sources were to be supplemented with investigations of establishments and industries known to employ undocumented workers and with leads and complaints obtained from other sources.[39] In view of this change in the EUW program's method of operation, this aspect of the GAO's criticism of the EUW program is no longer valid.

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[35] Id. at 12.

[36] Id. at 9.

[37] Id. at 13.

[38] Id.

[39] Id.

B. The Labor Law Enforcement Program Recommended by the Select Commission

The successes of the EUW program suggest that the Select Commission's recommendation that enforcement of labor laws be increased is a sound one. Although insufficiently emphasized by the Commission, such enforcement may be sufficiently effective in inhibiting illegal employment to be a viable and preferable alternative, in conjunction with other measures, to employer sanctions legislation. Such a program might, however, encourage employment discrimination against members of minority groups, because employers might fear that they would be targeted for investigation if they employed large numbers of minority workers. However, such dangers can be avoided without threatening the effectiveness of the program.

Under the current EUW program, an employer who employs large numbers of minority workers is more likely to be targeted than one who does not. This is because he is more likely to be targeted by the INS, and the INS will only make referrals to the Department of Labor of employers that have been investigated by the INS. The current method of targeting employers under the EUW program, therefore, encourages employers to avoid employing members of minority groups. This discriminatory effect can, however, be avoided by using an appropriate method of selecting employers to be investigated.

No employment discrimination would result, for example, if the INS were permitted to make referrals to the Department of Labor only of types of businesses in which large numbers of undocumented workers had been apprehended and not of particular business establishments which it suspects of employing undocumented workers. This referral system would permit the Department to utilize the expertise of the INS in determining what types of businesses are likely to be employing undocumented workers. It would then investigate particular employers selected at random from among the class of employers who engage in those types of businesses. Under this system, an employer could not decrease his chances of being investigated by the Department of Labor by refusing to hire members of minority groups, because employers in a targeted type of business would be investigated at random regardless of whether or not they employed members of minority groups. The employer could not decrease his chances of being investigated unless he changed his type of business. This targeting method would, therefore, provide him with no incentive to avoid hiring members of minority groups. Hence, by utilizing this method of targeting employers, an increased labor law enforcement program could be made nondiscriminatory as well as effective.

There are also ways in which a labor law enforcement program can be made more effective. One of the ways the program's effectiveness could be increased is for the Department of Labor to change its current practice of making referrals to the INS of suspected undocumented aliens and businesses suspected of employing undocumented aliens. There should be a method for sequestering complaints made to the Department of Labor so that the INS cannot use such complaints as a method of locating undocumented aliens. This would encourage undocumented aliens to complain about violations of existing labor laws.

Another way the program's effectiveness could be increased would be to ensure that employers are required to pay back wages regardless of whether or not the employee to whom the wages are owed can be located. Presently, any back wages due on employee salaries under the FLSA are retained by the employer if the employee cannot be located.[40/] Because of their desire to remain undetected, many undocumented workers who are due back wages cannot be located, and the employers therefore are permitted to retain the back wages.[41/] This means that even those employers found to have violated wage laws may nevertheless benefit from the employment of undocumented aliens at sub-standard wages, since such aliens are unlikely to come forward to collect their back wages. If employers were required to pay these back wages even when the employees could not be located, this final benefit from hiring undocumented workers would be removed.

The method for doing this should involve a two-step process. First, every effort should be made to locate employees who are due back wages. Consulates in foreign countries could be used to distribute back wages to employees who have returned to their own

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[40/] *Id.* at 24.

[41/] *Id.* at 3. Chicago area officers of the Department of Labor determined that $320,191 were owed to 1,854 employees. Employers agreed to pay back wages of $251,944 to 1,472 employees. However, 268 of the 1,472 employees (18.2%) could not be located and the employers retained the back wages.

countries.[42] Second, legislation should be passed requiring that, when employees who are due back wages cannot be located, the wages shall be deposited in the U.S. Treasury as miscellaneous receipts.[43] This two-step process will remove any remaining financial incentive to hire undocumented workers.

In conclusion, the possibility that a program for increased enforcement of labor laws could be an important part of an effective, nondiscriminatory alternative to employer sanctions legislation should be given careful consideration. Such a program will not, of course, completely solve all the social problems associated with illegal immigration. Therefore it will need to be accompanied by other measures, such as foreign aid and development policies, so that a comprehensive approach may be devised which is less discriminatory and more effective than employer sanctions. However, the increased enforcement of labor laws is likely to be much more effective in addressing certain critical problems arising from illegal immigration than is suggested by the subordinate role accorded to it by the Select Commission. Labor law enforcement is a proven means for combating depression of wages and working conditions. Since this is one of the few ill-effects of illegal immigration which has been established with any specificity, an increase in labor law enforcement should be seriously considered as a central and integral part of any comprehensive alternative to employer sanctions.

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[42] The Department of Labor has tested a pilot program using the Mexican Consulate to distribute back wages to Mexican nationals who left the country. Id. at 25.

[43] The GAO recommends this approach. Id. at 26. The Department of Labor is also testing a procedure whereby employers are asked to sign a stipulation that, if the workers cannot be located, back wages will be paid into the U.S. Treasury as miscellaneous receipts. Employers, however, are under no obligation to sign the stipulation. Id.

III. THE SELECT COMMISSION'S RECOMMENDATION THAT ENFORCEMENT OF EXISTING IMMIGRATION LAWS BE INCREASED

A. Current Immigration and Naturalization Service Enforcement of Immigration Laws

(1) Enforcement at the Borders of the United States

Currently, border enforcement receives more attention than enforcement in the interior.[1] About 450 border patrol agents are on duty along the Mexican and Canadian borders at any one time.[2] These agents have authority in the border area to stop vehicles without probable cause and to search them for illegal aliens.[3] Sensor systems, light planes, helicopters and other equipment are used to enhance the efficiency of these border patrol agents.[4]

Local police also participate to some extent in border enforcement, although they have no express authority to do so under Federal law. For example, the Los Angeles Times, on Aug. 10, 1978, reported that officers of the El Paso Police Dept. pick up people believed to be illegal aliens and return them to the Mexican side of the border.[5] Obviously, this practice could seriously jeopardize the rights of Mexican-American citizens living in the El Paso area.

(2) Enforcement in the Interior of the United States

Currently, efforts to enforce immigration laws in the interior of the United States focus primarily on places of employment.[6] The method of enforcement usually used is called an "area control operation", or "survey."[7] These control operations are usually conducted pursuant to general tips that undocumented workers may be present. The tips usually do not name specific undocumented workers who are present at that particular place of business. Typically, a large number of INS agents converge on a particular building. All entrances and exits to the building are blocked. Then persons inside the building are interrogated regarding their legal status in the United States.[8]

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[1] Final Report at 46.

[2] Select Commission Staff Decision Memorandum: Curbing Illegal Migration, at 1.

[3] United States v. Martinez - Fuerte, 428 U.S. 543 (1976); United States v. Brignoni - Ponce, 422 U.S. 873 (1975).

[4] See Final Report at 47.

[5] The Tarnished Golden Door: Civil Rights Issues in Immigration United States Commission on Civil Rights September 1980, p. 93 (hereinafter cited as: Golden Door).

There appears to be no uniform INS policy with respect to the criteria for selecting those to be interrogated during area control operations.[9] INS officers in some jurisdictions interrogate all persons in the area targeted for control; others select some persons for interrogation based solely on ethnicity; and others consider a combination of factors.[10] Factors that may be considered along with ethnicity include the fact that a person wears clothing that appears foreign, or carries lunch in a brown paper bag, or carries a newspaper written in a foreign language.[11] INS agents also consider the way the individual reacts to the presence of immigration agents.[12/] Such enforcement practices are inherently discriminatory and place inequitable burdens on persons of foreign appearance or manner, whatever their status.

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[6] Final Report at 46.

[7] Golden Door at 82.

[8] *Id.* at 86.

[9] *Id.* at 84.

[10] *Id.*

[11] *Id.* at 85.

Although the Immigration and Nationality Act expressly authorizes local police to enforce only the harboring provision of the federal immigration laws, local police often participate in enforcement of other provisions of those laws.[13/] Police often stop and question and detain persons suspected of being deportable aliens. They then place an "immigration hold" on such persons until the INS can check their status.[14/] This practice still goes on despite the official position of the INS and the Department of Justice that local police have no authority to arrest persons solely because they may be illegal aliens.[15/] This sort of police cooperation is generally agreed to be a bad idea because local police lack expertise in immigration law and have difficulty determining citizenship, immigration status, or validity of immigration documents; therefore, they are likely to make erroneous determinations, or to base their determinations upon impermissible and even unconstitutional grounds.[16/]

B. The Select Commission's Recommendations.

The Select Commission is recommending that enforcement of existing immigration laws be increased, both against undocumented

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[12/] *Id.* at 86.

[13/] *Id.* at 91-93.

[14/] *Id.* at 91-93.

[15/] *Id.* at 93.

[16/] *Id.*

aliens[17] and against U.S. citizens who aid them to enter the country illegally.[18]

(1) The Recommendation that Border Enforcement and Area Control Efforts be Increased

The Select Commission is recommending that additional personnel and equipment be provided to increase border enforcement and area control efforts.[19] All outstanding border-crossing cards would be replaced with counterfeit-resistant cards, and a mobile surprise inspection task force would be created to work in the border areas.[20] Furthermore, regional border enforcement posts would be established to coordinate the work of the Immigration and Naturalization Service, the U.S. Customs Service, the Drug Enforcement Administration and the U.S. Coast Guard in the interdiction of undocumented aliens.[21]

This proposed increase in border enforcement and area control efforts raises serious policy questions, since it could cause an increase in harassment, humiliation and abuse of and discrimination against members of minority groups and because it may be ineffective in significantly curtailing illegal immigration. Under the present enforcement program, there is evidence that INS employees have been insensitive to aliens seeking benefits from the INS and have been guilty of verbal and physical abuse of aliens who were being temporarily detained, interrogated or arrested.[22] An increase in money and personnel for border enforcement and area control efforts will almost certainly lead to an increase in the incidence of such abuses because there will be more immigration officers, and, therefore, more contact between immigration officers and members of minority groups. Moreover, the additional enforcement resources will almost certainly be utilized in a discriminatory fashion. Immigration officers will be much more likely to stop members of minority groups to inquire about their citizenship status than they would be to stop white individuals for this purpose. The result of these increased enforcement efforts, therefore, would be the harassment of minority citizens and aliens legally admitted to this country. This harassment would be especially severe in border areas where enforcement efforts are concentrated.

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[17] Final Report at 46-47.

[18] Id. at 52.

[19] Id. at 47.

[20] Id. at 50.

[21] Id. at 51.

[22] See id. at 243-44.

Such increased harassment is obviouslyundesirable, particularly since there remains considerable question about the extent to which increased conventional enforcement of this type will actually be effective. It is tempting to attempt to increase the effectiveness of border enforcement by noticeably militarizing the border areas. Such an increase in border enforecment, however, is unlikely to have a significantly greater effect on illegal immigration than do current enforcement efforts. In part, this is due to the enormous difficulty of controlling our extremely long land borders. More fundamentally, it is clear that many immigrants still seek to enter this country, even if there is a high risk of apprehension. Regardless of an increase in efforts to apprehend and expel immigrants, the conditions in the sending countries will continue to "push" undocumented aliens into this country. Furthermore, the hope of benefitting from the many advantages available in this country will continue to "pull" them into this country. Moreover, the mutual alienation and lack of trust that exists between INS officers and the Hispanic community in the border areas, and that has interfered with effective enforcement of immigration laws in the past will be intensified by the added violations of the rights of members of minority groups that will result from increased border enforcement efforts. This will make effective border enforcement even more difficult than it currently is.

As an alternative to increasing resources for conventional efforts such as apprehension, detention and expulsion, INS should consider improving the effectiveness of existing enforcement procedures by reallocating resources to service functions of INS. At present, virtually all aliens and minorities consider the INS to be uncooperative, antagonistic and inefficient. Therefore, while they do not actually impede INS enforcement efforts, they are unlikely to make an effort to assist it. If INS service activity were increased, and if the agency were perceived more sympathetically, fear of contact and cooperation with INS might be reduced, and its enforcement activity enhanced. To this end, it is imperative that effective safeguards be provided to minimize instances of abuses and harassment of aliens and of members of ethnic or racial minorities.

The Select Commission has recommended the institution of such safeguards. The program recommended by the Select Commissior would involve nine objectives. It would attempt to improve the responsiveness and sensitivity of INS officers by:

(1) establishing a code of ethics and behavior for all INS employees;[23]

(2) upgrading employee training to include meaningful courses at the entry and journeyman levels on ethnic studies and the history and benefits of immigration;[24]

(3) promoting the recruitment of new employees with foreign language capabilities and the acquisition of foreign language skills in addition to Spanish -- in which all officers are now extensively trained -- for existing personnel;[25]

(4) sensitizing employees to the perspectives and needs of the persons with whom they come in contact and encouraging INS management to be more sensitive to employee morale by improving pay scales and other conditions of employment;[26]

(5) rewarding meritorious service and sensitivity in conduct of work;[27]

(6) continuing vigorous investigation of and action against all serious allegations of misfeasance, malfeasance and corruption by INS employees;[28]

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[23] *Id.* at 242.

[24] *Id.*

[25] *Id.* at 243.

[26] *Id.*

[27] *Id.*

[28] *Id.*

(7) giving officers training to deal with violence and threats of violence;[29]

(8) strengthening and formalizing the existing mechanism for reviewing administrative complaints, thus permitting the Immigration and Naturalization Service to become more aware of and responsive to the public it serves;[30] and

(9) making special efforts to recruit and hire minority and women applicants.[31]

The Select Commission recommended that this safeguard program be implemented concurrently with an increase in enforcement efforts.[32] However, implementation of such a safeguard program could not sufficiently ameliorate the abuses that would result from increased enforcement efforts. Abuses have occurred in the past, and they will occur in the future despite the recommended sensitizing program, because it is not possible for any sensitizing program to remove the basic causes of these abuses. A classroom training program will not eradicate prejudices and character traits that have been built up over a lifetime. Moreover, a policy of investigating and punishing alleged abuses by INS employees will be enforceable to only a limited extent since undocumented aliens may be expected to be afraid to make complaints.

Nevertheless, it is extremely important that a safeguard program be implemented even if no increase in enforcement efforts occurs. Although such a program could not successfully prevent the increase in the incidence of harassment, humiliation and abuse of and discrimination against members of minority groups that would surely accompany increased enforcement efforts, it could help to ameliorate the abusive and discriminatory enforcement practices that exist under the present level of enforcement. The Select Commission's recommendations on this matter should, therefore, be implemented.

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[29] Id.

[30] Id.

[31] Id.

[32] Id. at 242-43.

If the program were implemented, the sensitivity of INS employees toward aliens and members of minority groups might actually improve somewhat. Minority INS employees and INS employees with foreign language capabilities would logically be more able and willing to respond to the needs of members of minority groups. Moreover, non-minority INS employees may learn from the minority employees or from the training programs to understand the problems of members of minority groups. This may make them more sensitive to those problems. Finally, an improvement in pay scales and working conditions for INS employees may have a positive effect on them psychologically and decrease the pressures that encourage them to engage in violent behavior.

Even if INS employees did not actually become any more sensitive toward aliens and members of minority groups, they might perceive that it was in their own best interest to behave in a more sensitive and responsive manner. If employees were rewarded for meritorious service, and if there were a code of ethics and behavior to explain what sort of service was expected, employees might try to do better than the code required so that they could receive a reward, which could take the form of raises or promotions. If the incentives were great enough, some improvement in the behavior of INS employees might be achieved.

On the other hand, those INS employees who do not improve their behavior as a result of the reward system may improve it as a result of the penalty system. If INS employees know that allegations of misfeasance, malfeasance and corruption by INS employees will be investigated and punished, they may be more careful not to do anything that would cause them to be investigated. This penalty approach to modification of the behavior of INS employees would be more effective, however, if the INS code of ethics and behavior imposed sanctions on employees who violated it. This would make it possible to gain some measure of control over behavior that currently cannot be punished.[33/]

In conclusion, there are serious shortcomings in the Commission's proposal to increase enforcement and area control efforts. Such an increase would be unlikely to be effective and would seriously jeopardize the rights of members of racial and ethnic minority groups. The program of safeguards recommended by the Select Commission to

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[33/] Ultimately, of course, there can be no assessment of the likely effectiveness of such safeguards or of the need for additional ones, without a consideration of the successes and problems which have been the experience of similar programs in those police departments which have tried them. The Select Commission's work might be profitably supplemented with such additional research.

protect the rights of members of such minority groups should, however, be implemented. Even if border enforcement and area control efforts are not increased, such a safeguard program is necessary to help ameliorate the discriminatory and abusive impact of current enforcement methods.

(2) The Recommendation that a Fully Automated System of Nonimmigrant Document Control be Implemented

The Select Commission is recommending that a fully automated system of nonimmigrant document control be implemented to assist immigration officers in apprehending student visa abusers and persons who overstay their visas.[34] Such a system would permit immigration officers to keep track of whether nonimmigrants leave the country in compliance with limitations on authorized stay and whether foreign students and other nonimmigrants are in status.[35]

Such a nonimmigrant document control system could be a less discriminatory method of enforcement than border enforcement or area control operations. Enforcement efforts conducted with the aid of information supplied by the computer system would focus on specific individuals who are believed to be violating immigration laws. They would, therefore, involve less discrimination against minority citizens and aliens who are not violating immigration laws than would the dragnet type of enforcement used in border enforcement and area control operations. Consequently, the document control system would be preferable to border enforcement and area control operations. It would, however, be effective only against those aliens who entered the country legally and subsequently violated the conditions of their visas. The effectiveness of this enforcement method will, therefore, depend upon the percentage of the undocumented alien population that falls into this category. Because the Commission has not obtained factual information concerning this percentage, it has not been able to assess accurately how effective this enforcement alternative would be.

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[34] Id. at 53-55.

[35] Id. at 54.

(3) The Recommendations Regarding Involvement of State and Local Law Enforcement Officials in Enforcement of Immigration Laws

The Select Commission is recommending that state and local law enforcement officers be prohibited from apprehending persons on immigration charges, except in alien-smuggling cases, but that they continue to be encouraged to notify the INS when they suspect a person who has been arrested for a violation unrelated to immigration to be an undocumented alien.[36] The Commission believes that, because of the complexity of immigration law, and because of the lack of training of state and local law enforcement personnel in that area, apprehension by state and local law enforcement officers of persons suspected of immigration violations would be likely to result in continuing civil rights violations against U.S. citizens and aliens legally in the U.S.[37] Further, it would be likely to alienate local police from segments of the communities they serve, to the detriment of effective law enforcement.[38] Therefore, the Commission believes that local law enforcement officers should be prohibited from apprehending persons on immigration charges except in alien-smuggling cases.[39/] However, when a person is arrested for a violation unrelated to immigration, and is not a victim of or a witness to that crime, and is suspected of being an undocumented alien, the Commission believes that state and local law enforcement officers should be encouraged to notify INS, which may then make further inquiry into the immigration status of the individual.[40/]

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[36] *Id.* at 256-57.

[37] *Id.* at 257.

[38] *Id.*

For the reasons the Select Commissicn has identified, their recommendation that state and local law enforcement officers be prohibited from apprehending undocumented aliens is a wise one. For the same reasons, however, local law enforcement officers should be prohibited from notifying INS when a person arrested for a violation unrelated to immigration is suspected of being an undocumented alien. There is no reason to believe that local law enforcement officers would be competent to determine whether persons under arrest are undocumented aliens when it is recognized that they are not competent to determine a person's citizenship status in other contexts.

Moreover, if local police notify INS of persons arrested by them whom they suspect of being undocumented aliens, they will alienate segments of the communities they serve. Members of minority groups may suspect that the police are arresting those they believe to be undocumented aliens on trumped-up charges. Undocumented aliens

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[39/] Id. Although state and local law enforcement officers are not legally authorized to apprehend persons on immigration charges generally, (except in California and Illinois where state law empowers local law enforcement officers to enforce federal laws) they are authorized to apprehend persons in alien-smuggling cases. Id. at 256.

[40/] Id. at 257.

and people associated with them will be afraid to become involved with the police. Not understanding or trusting that victims and witnesses are immune from referral to INS, they may fail to complain when they become victims of crimes, or fail to come forward when they are witnesses to crimes. This detriment to effective law enforcement will not be eliminated by restricting local police involvement in immigration law enforcement to notification to INS when an arrestee is suspected of being an undocumented alien. As long as any connection remains between the local police and INS, the police will be unable to gain the confidence or support of this segment of the population.

IV. THE SELECT COMMISSION'S RECOMMENDATION THAT LEGISLATION BE PASSED MAKING IT ILLEGAL TO HIRE AN UNDOCUMENTED ALIEN (EMPLOYER SANCTIONS LEGISLATION)

The Select Commission on Immigration and Refugee Policy is recommending that, to supplement current methods of enforcement, legislation be passed making it illegal for employers to hire undocumented workers.[1/] Currently, under federal law, most employers are permitted to hire undocumented aliens. Only farm labor contractors are prohibited from hiring such persons,[2/] while the Immigration and Nationality Act, which has broader application, expressly exempts employers from prosecution for hiring undocumented aliens.[3/] The Select Commission's recommendation would change the current law and make employment of undocumented workers generally illegal.

Employer sanctions legislation, however, will almost certainly do more harm than good and will not be cost-effective. As explained below in detail, employer sanctions are likely to be ineffective as a means of achieving the Select Commission's goal of excluding undocumented aliens from the work force, and thereby creating job opportunities for those legally entitled to work, improving wages and working conditions, and preventing illegal immigration. However, employer sanctions legislation will certainly impose heavy burdens on employers and employees alike. Further-

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1/ *Final Report* at 61.

2/ Farm labor contractors are prohibited by the Farm Labor Contractor Registration Act from "recruiting, employing, or utilizing, with knowledge," undocumented workers or persons without employment authorization from the Attorney General. 7 U.S.C. § 2045 (1976).

3/ 8 U.S.C. 1324 (§ 274 INA) (a)(4) states that employment of an undocumented alien does not constitute illegal harboring of that alien.

more, the verification system that will be necessary so that employers can ascertain whether a prospective employee is undocumented may cause civil liberties violations. Even more important, such legislation will encourage employers to discriminate against members of minority groups. In light of these problems, the enactment of employer sanctions legislation is inadvisable.

A. Deleterious Effects of Employer Sanctions Legislation

(1) Summary

A careful and detailed analysis of each option for administering and enforcing employer sanctions suggests that each inevitably places significant new burdens on employers, and endangers equal employment opportunity.[4/] An employer sanctions system will offer new opportunities for discrimination for those employers who already do not wish to hire minorities, and will create altogether new incentives to discriminate for employers who are not presently inclined to do so. Further, such additional discrimination will add to the long delays that all complainants already experience in obtaining relief for present forms of discrimination from a seriously backlogged Equal Employment Opportunity Commission. Rendering existing remedies less effective can only encourage employers to continue existing forms of employment discrimination.

4/ See Discriminatory Effects of Employer Sanctions Proposals, Institute for Public Representation, Georgetown University Law Center. December 1980. (Analysis submitted to Select Commission on Immigration and Refugee Policy).

The new discrimination which employer sanctions will give rise to will take several forms. First, there is some cause for concern that the applications of members of minority groups for initial government certification of their right to work will be subjected to greater scrutiny or delay than the applications of "obviously American" workers.

Second, the very existence of an employer sanctions system will create a widespread perception that employers may, and indeed must, consider an applicant's non-job-related identifying characteristics in order to discharge their legal responsibilities. In addition to encouraging well-meaning employers to discriminate, this will make it much harder to prove a charge of racial discrimination, under equal employment laws, against those who intentionally discriminate.

Third, particularly in areas where large minority populations and populations of undocumented workers coexist, if there remains any question at all about the reliability of the verification procedure in a given employment transaction, an employer will inevitably fear disruption of his operations as a result of subsequent determinations of the ineligibility of particular workers. This will cause him to act with particular caution in employing "possibly illegal" workers, or in promoting them to supervisory positions.

Fourth, the record-keeping and verification procedures mandated by any option will increase the cost and administrative burden of an employer's enterprise. Since an employer will only need to show that he followed these procedures if in fact he is found to have actually hired an undocumented worker, he will be able to avoid the need to comply with such procedures simply by rigorously excluding any "possibly illegal" workers from his workforce. This will, of course, place unequal burdens on members of those minority groups who share identifying characteristics with groups known to be significant in the population of illegal aliens.[5/]

The source of the greatest cause for concern must, however, be the uncertainty that an employer will feel about the reliability of the proof of authorization proffered by a job applicant and about the circumstances under which he will in fact be held liable for violating an employer sanctions law. It has been widely recognized that an employer sanctions system which does not offer an employer a ready means for ascertaining the authorization to work of a job applicant will inevitably lead employers to protect themselves from liability by discriminating against "possibly illegal" (i.e. usually minority) applicants.

Proponents of employer sanctions have acknowledged this concern. They have suggested that such risks will be eliminated by the creation of a universal work authorization document which may be presented to an employer as ready and simple proof of authorization

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5/ The Commission at one time considered recommending that it be made illegal to hire _any_ person, whether an undocumented alien or not, without evidence or a statement of eligibility, or ignoring the requirements to secure such evidence or statements and keep records regarding them. While such a provision would be essential to prevent this kind of employment discrimination, its enforcement costs would necessarily be high, and would result in imposition of penalties on persons who may never have hired an undocumented person at all.

to work. The simplicity of such a transaction, it is argued, will leave an employer no reason to discriminate against minority job applicants. However, this argument overstates the possible "reliability" of any identification system, and oversimplifies the realities of employer's perceptions and fears under a law which will expose them to substantial penalties.

The following sections discuss these issues in detail, focussing first on the type of discrimination which will be created by various verification procedures, and then discussing the closely related issues of proposed standards of employer liability. This analysis is followed by a discussion of other adverse effects of employer sanctions, including discriminatory enforcement procedures, interference with the autonomy of employers and labor organizations, and infringements on civil liberties. A consideration of employer sanctions in this degree of detail raises serious doubts about whether a system can be devised which is effective, non-discriminatory, and not unacceptably burdensome to employers.

(2) Discriminatory Impact of the Employee Eligibility (Verification) System

Although the Select Commission discussed several possible methods for enabling an employer to verify an employee's employment eligibility, the Commissioners were unable to agree to recommend any one specific system.[6/] They did agree that the verification system should be reliable, protective of civil rights and liberties, and cost effective.[7/] However, it does not seem possible to design a verification system that meets all of the criteria agreed upon by the Select Commission.

It will be particularly difficult, and probably impossible, to design a verification system that does not, in itself, encourage employment discrimination against members of minority groups. Although this discriminatory impact may be mitigated somewhat by using a procedure such as a national identity card system, which leaves little to an employer's discretion, such a system would be extremely costly and would raise serious civil liberties issues. Moreover, a considerable discriminatory impact could still be expected. Alternative types of verification systems that would be less costly and less repugnant to civil liberties values, such as a system that uses currently available forms of identification such as social security cards or birth certificates, would have an even more severe discriminatory impact, and would not be rigorous enough to accomplish their purpose. The more responsibility

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[6/] Final Report at 68-69.

[7/] *Id*. at 69.

an employer has to make a subjective determination of an applicant's work authorization status, the more opportunity that employer will have to discriminate, because the employer can plausibly claim that he thought that the prospective employee was not authorized to work. A subjective system will also actually create an incentive to discriminate, even if the employer was not originally inclined to do so, because the employer may be unable to ascertain the prospective employee's work authorization status with absolute certainty and will, therefore, probably be extremely cautious about hiring members of minority groups who might be undocumented. Consequently, any work authorization verification system that fails to provide employers with a totally objective method of determining a prospective employee's work authorization status will result in discrimination against members of minority groups. This should be kept in mind while evaluating the various verification systems that have been suggested. Unfortunately, each of them fails to provide a sufficiently objective method of identification, and is therefore fundamentally flawed.

(a) Discriminatory Impact of a National Worker Identification Card Verification System

Although the Select Commission has not specifically recommended any particular verification system, it has discussed several different possibilities.[8] One system discussed would require all prospective employees to have a national worker eligibility card.[9] Government officials would issue these cards to workers who produced satisfactory evidence that they were citizens or aliens legally entitled to work. Employers would be forbidden to hire any employee who could not produce such a card, and would probably be required to keep records of all "transactions" with workers so that INS could assess the employer's compliance with the verification obligations.

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[8] Final Report at 68-69.

[9] *See id.* at 68.

While seeming entirely objective, this worker identification card system still gives employers the responsibility to make subjective judgments about a critical factor in determining a prospective worker's work authorization status, and would therefore cause discrimination against minorities. First, the employer must compare the characteristics displayed on the card with the characteristics of the card-holder to determine whether they match. Second, the employer must determine whether the card has been altered or forged.

To protect themselves from inadvertently hiring an undocumented worker, even employers who have no desire to discriminate are likely to scrutinize cards held by members of minority groups much more carefully than cards held by "obviously American" white workers. In doubtful cases, employers will probably believe a white worker's explanation that, since the photograph on the card was taken, he or she gained or lost weight, dyed his or her hair, grew a moustache, accidentally spilled nail polish on the card, etc.. Such explanations, however, are less likely to be accepted from members of minority groups. Even in cases that are not truly doubtful, employers who want to discriminate can defend their actions by claiming that they believed the prospective employee to be undocumented. This system will therefore encourage all employers, regardless of their inclination, to discriminate against minority job applicants.

The ID card system would be disproportionately burdensome for members of minority groups for the further reason that only workers seeking new jobs would be required to prove their authorization to work. The burden of employer sanctions legislation would, consequently, fall most heavily upon workers who change employment frequently. Because these workers include a high percentage of minority citizens,[10/] this burden will fall most heavily upon them.

Still another reason that the ID card system will be disproportionately burdensome for members of minority groups is that workers would be required to present satisfactory documentary proof of eligibility to work before they are issued ID cards. Members of minority groups are more likely than white citizens to have difficulty producing the required documentation. Low-income, marginally employed persons, particularly minority youth, will often not have generated the records required for work authorization. Since such documentation is itself easily susceptible to forgery it is possible that, to prevent huge backlogs of work from developing, government employees charged with administering the employer sanctions law will summarily grant the work authorization applications of white workers, and scrutinize only the applications of Hispanics, Asians, blacks or other "foreign looking" persons. Thus, these individuals may experience extensive delays in obtaining government authorization to work.

[10/] *See*, *e.g.*, Equal Employment Opportunity Commission, *Equal Employment Opportunity Report: Job Patterns for Minorities and Women in Private Industry*, at xvii (1975).

A final way that the ID card system will result in discrimination against members of minority groups is by creating strong incentives for immigration officers to stop members of minority groups and demand to see their cards as proof that they are not undocumented aliens.[11/] Immigration officers will be aware that most people entitled to work will have such a card, and these officers will view a person's inability to produce such a card as evidence that she or he is an undocumented alien. Thus, members of minority groups would have to carry their cards at all times to prove that they were not undocumented aliens. Even though they would not need them for employment purposes, self-employed minority citizens might well have to apply for and carry cards so they could show them to immigration officers. Thus, a *de facto* system might well develop in which all members of minority groups would be encouraged to carry cards to prove their citizenship status.

It has been argued that workers would be required to carry their cards only when seeking employment and that individuals would, therefore, not be carrying their cards frequently enough to encourage the development of such a *de facto* system of identification of members of minority groups. For enforcement of employer sanctions legislation to be effective, however, employees would have to be

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[11/] There is a further danger that the card will also be demanded by local law enforcement officers. Already, law enforcement officers in certain localities demand alien registration cards from Hispanic persons in the course of their daily duties. It would be difficult to establish whether this was done in the illegitimate pursuit of immigration law enforcement, or in the legitimate pursuit of the duty to identify a person suspected of some other offense. In either case the practical result would be the same.

required to carry their cards at least during their working hours. Otherwise, immigration officers would be unable to check the identification of workers against the employer's records during area control operations. Moreover, many members of minority groups may elect to carry these cards as a means of proving their citizenship, and thereby shortening the duration of encounters with immigration officers and police. The incidence of card-carrying would, thus, be sufficient to encourage immigration officers to ask to see these cards. Their practice of asking would, in turn, induce more citizens to carry cards. The result of this snowball effect would be the *de facto* system of identification of members of minority groups described above.

Another system that the Select Commission has discussed would entail improving existing forms of identification to make them more secure.[12] In particular, a counterfeit-resistant social security card has been discussed.[13] Not only would this system present the same problems as the national worker identity card system and have the same discriminatory impact, but use of social security numbers or cards to establish employee eligibility may encourage forgery or misuse of social security numbers, and thereby endanger the social security recordkeeping system.[14]

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[12] Final Report at 68.

[13] *Id*.

[14] Supplemental statement of Commissioner Patricia Roberts Harris, Final Report Appendix B at 331.

(b) Discriminatory Impact of a Data Bank Verification System

Another verification system that the Select Commission has discussed is a call-in data bank system.[15] Under this system, government officials would assign a unique work permit number to every worker who produced satisfactory evidence of entitlement to work. A work permit file would then be compiled on the worker. Information in this file would include the information upon which the finding of work eligibility had been based as well as identifying information such as the worker's full name, height and weight, and the full names of the worker's parents. Before hiring a prospective employee, an employer would be required to call the data bank and receive (1) confirmation that the worker's number was valid, and (2) information about the worker's identifying characteristics. The employer would be permitted to hire the prospective employee only if the number was valid, the information about the worker to whom it was issued matched information supplied by the prospective employee. The data bank computer would then provide a unique transaction number which the employer would keep in his records to prove the outcome of the transaction.

The Department of Labor conscientiously attempted to design a data-bank scheme so as to eliminate the risks of employment discrimination.[16] That it failed effectively to do so, and, indeed, that it threatened to create novel incentives to discriminate, are compelling indications that it is impossible to design a non-discriminatory work-authorization data-bank.

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[15] Final Report at 68.

A substantial danger raised by the data bank system is that the computer may break down or be subject to extended delays. If this occurs, during the time that the computer is being repaired employers will have absolutely no guidance in determining which prospective employees are authorized to work. If they find it necessary to hire someone during such a period, the only way they can protect themselves against hiring an undocumented alien would, again, be to hire someone who is "obviously American" and not a member of a minority group. Employers may be afraid that, even if they go through the appropriate procedure, if they inadvertantly hire an undocumented worker, and if the data bank system malfunctions, they may be unable to prove that they complied with the law. Moreover, employers who want to discriminate can relay inaccurate information to the data bank system so that the system will deny the employer permission to hire the prospective employee.

Indeed, it appears upon closer scrutiny that even the Department of Labor's data-bank approach to verification of authorization to work eliminates only the employer's opportunity to match the physical characteristics of an applicant with an authoritative repository of information about such characteristics. In every other respect it offers the same incentives and opportunities to discriminate, and indeed threatens to create new ones.

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[16] A Work Authorization Enrollment and Verification System, Employment and Training Administration, United States Department of Labor, October 1980.

(c) Discriminatory Impact of a Verification System Utilizing Currently Available Forms of Identification

Another verification system that the Select Commission has discussed would make use of currently available forms of documentation, such as birth certificates, social security cards, alien identification cards, or affidavits.[17] One form that such a system could take would require employers to examine documentary evidence that a prospective employee is entitled to work before hiring that employee. Although it remains unclear what documents would constitute acceptable evidence, social security cards, baptismal certificates and birth certificates have been discussed as possibilities. Employers would be required to keep records of the documents they examined with respect to each employee. Employers might possibly be required to send copies of these records to the government, which would check them against its own data files to determine whether the employees were, in fact, entitled to work.

This system is more discriminatory than either the ID card or data bank systems. Under this system, employers have the responsibility to make an almost entirely subjective determination of the validity of proferred documentation. Employers must make this determination based upon documents that contain little identifying information about the worker. Moreover, the employer has no reliable way to determine whether a particular social security number is valid or whether the documents presented are forged. Under these circumstances, there is no way an employer can differentiate between a prospective employee who is authorized to work, one who has borrowed the papers of someone else who is authorized to work, and one who has forged papers to show his or her authorization to work. Consequently, the only way an employer could insure against hiring an undocumented worker would be to refuse to hire any members of minority groups.

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[17] Final Report at 68.

A variation of this system might require employers to substitute for or supplement the required documentation with an employee's affidavit stating that he is authorized to work. Such a system would operate in basically the same way as the system requiring only that a prospective employee present documentation showing his authorization to work. Any additional reassurance to employers resulting from the affidavit requirement is likely to be insufficient to make any change in the discriminatory impact of the verification system. Employees who are already breaking the law will be unlikely to be deterred by the threat of a perjury prosecution. Hence, this system would give the employer little or no assurance that the prospective employee is authorized to work. The employer's determination must, therefore, be made in a totally subjective fashion.

Consequently, unless the fact that an employer had obtained such an affidavit was an absolute defense to his prosecution (a "safe harbor provision", which would emusculate effective enforcement), the affidavit system would be as defective as all of the verification systems that have been suggested. The only way an employer could protect himself against hiring an undocumented alien would be to refuse to hire any members of minority groups.

Moreover, this incentive for employers to discriminate against minority workers will be augmented by the fact that, under the affidavit system, no government determination of a worker's employability is made until after he has been hired. As explained above, employers may be reluctant to hire and train or promote employees that they may have to fire as soon as the INS processes their affidavits.

3) Discriminatory Impact of the Standards for Employer Liability

As the preceding discussion indicates, one of the reasons an employer sanctions system will lead to discrimination is that employers will not be certain about a person's status, and will therefore feel compelled to subject minority applicants to special scrutiny or refuse to hire them altogether. The verification proposals under consideration do offer varying degrees of certainty, but none entirely eliminates some element of judgment by the employer. Therefore a fundamental issue in any analysis of employer sanctions is the standard of employer liability; i.e., how certain must an employer be of an applicant's status, and under what circumstances will an employer be found to have violated the prohibition against the hiring of undocumented workers? Despite the significance of this issue, the Select Commission does not explicitly recommend any particular standard of employer liability. While several different standards have been suggested, all of them suffer from serious defects.

(a) The "Knowingly" Standard of Employer Liability

Although the Select Commission has not expressly recommended any specific standard of employer liability, its deliberations and its Final Report suggest that it considers most desirable a standard that makes employers liable for "knowingly" hiring an undocumented alien. The proposals do not define "knowingly," however, and therefore leave open critical questions such as the relevance of *pro forma* compliance with verification procedures in determining whether an employer "knows" a person is undocumented. Further, if such legislation failed to adequately define "knowingly" it would have an extremely negative impact on availability of employment opportunity to minority workers. The danger exists that courts, in order to avoid making the law unenforceable, will adopt the tort definition of "knowledge," which is "what a reasonable person would know under the circumstances." "Knowledge", then, could be proved by showing that the circumstances - the applicant's appearance, accent, or inability to speak English, or surname, or a combination thereof - would indicate to a reasonable person that the employee was an undocumented alien, despite the employee's assurances to the contrary.[18/] If

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[18/] *Employer Sanctions*, Notre Dame University Law School Center for the Study of Human Rights § 3 at 9. (hereinafter cited as: *Notre Dame*).

courts determined this to be the standard of liability, or if employers feared that courts might subsequently determine this to be the standard of liability, employers would be forced to refrain from hiring minorities simply to protect themselves from possible prosecution. Such a broad definition of knowledge would also make it easier for employers to avoid liability for violation of equal employment laws by allowing them to assert that they believed the evidence of work eligibility proferred by an applicant to be insufficient or forged. It would be extremely difficult to show that such was not, in fact, the employer's belief. The practical effect may be to reverse much of the progress that has been made in the last decade toward equalization of employment opportunities.

(b) "Safe Harbor" Provisions

It is possible to draft legislation that would require only that an employer follow a specified procedure before hiring a worker, and that would provide an absolute defense to an employer who hired an undocumented alien as long as he had followed the prescribed procedure. Proponents of employer sanctions argue that such "safe harbor" provisions would protect employers who unwittingly hire undocumented workers,[19] and thus remove any incentive to discriminate on the basis of ethnic characteristics.

Several possible "safe harbor" provisions have been suggested. One such procedure would require the employer to record the worker's social security or national identification card number and forward it to an appropriate government agency. Another would require the employer to request to see evidence of an employee's citizenship or valid residency, and to sign an affidavit stating that he had seen the proper identification.[20/] A third possible procedure could require an employer to collect affidavits from employees certifying their authorization to work.[21/]

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[19] Notre Dame at 23.

Such a "safe harbor" approach might avoid some of the worst effects described above, since it would appear to make the employer's actual knowledge of an applicant's status irrelevant. However, it fails to define whether the employer will have any obligation at all to evaluate the authenticity of the proferred identification or the reliability of an affidavit. This is particularly important because it is highly likely that there will be widespread attempts to forge documents, no matter how "counterfeit-proof" they are made, and that persons illegally seeking to work will not hesitate to sign false affidavits. If an employer has no obligation to evaluate the documents or affidavits, the "safe harbor" procedure is unlikely to be an effective means for policing employer behavior, since it fails to provide for a way of distinguishing honest mistakes by the employer

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[20/] *Id.* at 21.

[21/] *Id.* at 21.

from a heedless pro forma compliance with the procedures. On the other hand, if an employer is required to make any "good faith" judgment about the documents, the "safe harbor" provisions will not eliminate uncertainty, and employers will still have to subject minority job applicants to special scrutiny. It therefore leaves the incentive to discriminate intact.

All three safe harbor provisions also continue to impose procedural and recordkeeping burdens on the employer which, as indicated above, employers may decide to avoid by refraining from hiring members of minority groups, who could be undocumented aliens. "Safe harbor" provisions also do nothing to remove the fear that an employer's operation will be disrupted by a subsequent determination of the ineligiblity of a worker whom the employer has hired or promoted.

(c) Strict Liability and "Pattern or Practice" Standards

The only effective way to impose liability on employers who violated an employer sanctions law would be to impose strict liability for employment of an undocumented worker. However, this would obviously impose severe burdens on both employers and employees. Employers would have much to fear from such a draconian measure. Such a standard of liability would also encourage employment discrimination, because an employer who will be held strictly liable every time he hires an undocumented worker can avoid liability only by rigorously and diligently excluding from employment anyone who could possibly be an undocumented worker. Thus, he would have to diligently exclude all members of minority groups or at least subject them to extremely careful scrutiny before hiring them.

Proponents of employer sanctions have suggested that such problems might be avoided with a "pattern or practice" standard. The Carter Administration proposed legislation that would have directed the Justice Department to proceed against employers who engage in a "pattern or practice" of employing illegal aliens.[22/] Legislative history on the Carter bill[23/] indicates that the term "pattern or practice" there was intended to have a meaning similar to the meaning of the same term within the Civil Rights Act of 1964.[24/] That is, the government must show that the violation is the company's standard operating procedure - the regular rather than the unusual practice.[25/] In addition, the Carter Administration legislation would have permitted an employer to avoid liability by proving that prior to employment or within 90 days, the employer saw documentary evidence that the suspected person was eligible to work in the U.S. The Attorney General would prescribe the particular methods to document proof, and compliance with the prescribed methods would create a rebuttable presumption that an

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[22/] S. 2252, 95th Cong., 1st Sess., 123 Cong. Rec. 10864 (1977).

[23/] 95th Cong., 1st Sess. 123 Cong. Rec. 18069 (1977).

[24/] 42 U.S.C. 2000e-6 (1964).

[25/] International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 336 (1977)(interpreting "pattern or practice") as it relates to Title VII of the Civil Rights Act of 1964 and racial discrimination among employers).

employer had not engaged in a practice of hiring illegal aliens.

Such a standard's only distinguishing feature would be that several violations would be necessary before an employer could be prosecuted. Because prosecution would be somewhat less likely, the statute may have a somewhat less chilling effect on employment of minority workers than a strict liability statute. However it would clearly impose unequal burdens upon employers in regions of the country where large numbers of undocumented aliens reside, since they will either suffer greater risk of prosecution or have to undertake particularly elaborate procedures to evade liability.

(4) Employer Sanctions Will Create Intolerable Risks and Burdens for Employers

It is readily apparent that many of the features of employer sanctions systems which create risks of employment discrimination also create added difficulties for employers in the conduct of their businesses. Indeed it is clear that, in many instances, the risk of discrimination arises largely because overbroad exclusion of types of workers is the only way in which an employer may avoid the risks and burdens imposed on him by employer sanctions.

All employers will certainly be burdened by the verification and record-keeping obligations. The more effectively one wishes to monitor employer compliance, the more burdensome will be such verification and record-keeping requirements.

Furthermore, the uncertainty, under even the best of employer sanctions systems, about the circumstances under which liability will attach to an employer, coupled with uncertainty about the reliability of identification documents, will create a veritable nightmare of unpredictability and close-call judgments for the employer. Except under "safe harbor" provisions, employers will never know whether they have complied sufficiently to evade liability for honest mistakes. The constant threat of a residual likelihood of liability will force employers to be scrupulous in making hiring decisions, but without knowing what kind or degree of scrupulousness represents a faithful discharge of their duties under the law.

Moreover, employers will always have to entertain the possibility that a worker whom they have hired or promoted will subsequently be found ineligible for employment. Such added threats of disruption of business operations are intolerable, since business people must, in order to function, have an expectation of predictability and reliability in making business decisions.

Finally, as suggested by the discussion above, an employer sanctions scheme will inevitably give rise to hiring transactions in which it will be harder to clearly establish whether discriminatory intent or some other consideration has led to rejection of an applicant for employment. This may create an incentive for applicants to file discrimination complaints in a broad range of cases, since only the filing of such a complaint will make possible the more accurate assessment of whether in fact discrimination has take place. Thus, employers may well find themselves subjected to a plethora of discrimination complaints, and find themselves put to considerable expense and trouble to refute such complaints. At the very least, it is certain that employers will be left with no clear and reliable standards to guide their behavior in hiring transactions. Such uncertainty about the significance of one's behavior in one's day-to-day business operations is quite intolerable.

(5) Employer Sanctions Will Place Burdens on the Autonomy of Employees and on Labor Organizations

It has been suggested above that employer sanctions mandate scrutiny by an employer into many of an applicant's identifying characteristics which have no relationship to his or her competence to perform the task. It has also been suggested that this will provide a pretext for any discriminatory inclinations which an employer may already have. For example, this will provide employers with opportunities to inquire into a prospective applicant's experiences with, or attitude to, labor organizing, and into other matters such as personal or religious values, which ought not to be within an employer's power to determine or penalize. The uncertainty about the exact standards of liability and about the reliability of identification documents proferred by an applicant for a job will inevitably require that an employer have some leeway in what subjective concerns he interjects into his hiring decision. This leeway will shield from scrutiny discriminatory decisions by an employer on the basis of religious or ideological inclination, or past experiences. Since the resources of the National Labor Relations Board are limited, and since individual applicants already have difficulty in discovering that anti-union animus motivated their rejection by an employer, employer sanctions will add considerably to the difficulty of preventing this particular unfair labor practice.[26] Such an outcome would threaten to place additional strictures on labor organization. Most fundamentally, this would redefine the scope of an employer's power over his employees to undermine significant aspects of a worker's personal autonomy.

It is also highly likely that essential labor union functions will be burdened with corollary duties arising from employer sanctions legislation. Such legislation may explicitly or implicitly impose upon labor unions and their officers a legal duty to screen the immigration status both of applicants for membership in the union and of members whom the union refers for employment. Even if the legislation does not explicitly require such screening, the danger of being held liable as an accessory to a hiring violation, will inevitably make it highly advisable. Thus, "employer sanctions" will effectively result in "union sanctions" and impose upon unions uncertainties and costs of compliance similar to those imposed upon employers. Since these will in turn lead to similar incentives to discriminate, they will place labor unions in the untenable position of being forced to discriminate against their own members or potential members. This will add great practical difficulties to the pursuit of practical goals such as organization of the unorganized and solidarity in the pursuit of improved wages and working conditions. The question of the likely impact on union functions of employer sanctions legislation has been almost ignored until now and requires further study.

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[26] § 8(a) National Labor Relations Act.

(6) Discriminatory Impact of the Mechanics of Enforcement

(a) Discriminatory Impact of Investigative Interrogations

To determine whether employers are complying with employer sanctions legislation, it will presumably be necessary for government officials to interrogate employees to determine their status. In doing so, the government officials will probably use impermissibly discriminatory criteria in selecting the employees to be interrogated. In enforcing existing immigration laws, government officials often use racial, ethnic, or national origin criteria in determining which employees to interrogate (see § III. A., supra.). There is every reason to believe that a similar practice will develop with respect to enforcement of employer sanctions legislation. If this does in fact occur, many minority citizens and aliens legally entitled to work will be subjected to unnecessary harassment. Moreover, employers may become reluctant to hire members of minority groups because these government interrogations will interrupt their business operations longer if there are large numbers of minority employees to be interrogated.

(b) Discriminatory Impact of Investigative Priorities

The investigative priorities that will almost certainly be followed under the proposed employer sanctions legislation may have the effect of discouraging employers from hiring minority workers. Regardless of the investigative standards articulated by the agency charged with enforcing the legislation, enforcement is bound to be focused, in practice, on employers of large percentages of minority workers. This is what has happened in practice in the enforcement of already existing immigration laws (see § III. A.(2), supra.). For similar reasons, it will almost certainly become the practice under employer sanctions legislation. Such legislation, therefore, will discourage employers from hiring minority workers, because the employment of large numbers of minorities will greatly increase the likelihood of investigation and disruption of business operations.

(c) Discriminatory Impact of Prosecutorial Discretion

The prosecutorial priorities that are likely to develop under an employer sanctions law may have the ultimate effect of decreasing employment opportunities for minority workers. Regardless of the standard of liability, a prosecutor will almost certainly be more interested in pursuing a case against an employer who has intentionally hired undocumented workers on a large scale, rather than a case against an employer has been careless or who has occasionally hired a small number of such workers. Therefore, a prosecutor will be more likely to pursue cases involving employers who have been charged before or who are charged with several violations on a single occasion. Unfortunately, the same employers who would be likely to hire undocumented workers would also tend to be the best source of employment for aliens legally entitled to work, and for minority citizens who have limited ability to speak English, because these groups will tend to have similar job skills. After these employers have been prosecuted a few times, they may decide that, rather than take a chance on making an erroneous determination with respect to whether an employee is an undocumented alien, they would rather refrain from hiring members of minority groups altogether. They will be aware that they will be more likely than other employers to be prosecuted for a mistake, because the prosecutor will be less willing to believe that the hire was indeed a mistake. Therefore, a side effect to the sought-after effect of forcing such employers to discontinue employment of undocumented aliens may be the unwanted effect of causing them to discontinue employment of members of minority groups who are legally entitled to work.[27]

(7) Dangers to Civil Liberties Posed by Mechanisms for Establishing Authorization to Work

Each option considered in detail by the Select Commission for establishing eligibility for employment poses serious dangers to a variety of personal liberty interests. This may explain the lack of specificity in the Commission's ultimate recommendations on the subject. While all Commissioners agreed, after considerable controversy, that any system must protect civil rights and liberties, the Commission's Final Report gives no indication of how these fundamental principles are to be preserved. While serious questions remain about whether any mechanism can be reliable enough both to avoid employment discrimination and to ensure effective enforcement of employer sanctions, there is no question that any new system for establishing eligibility for employment will inevitably threaten the civil liberties of all citizens and lawful residents.

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[27] This effect will be exacerbated, if, as the Select Commission is recommending, the penalty system is graduated so that employers who have had prior convictions receive harsher penalties.

Any system for establishing eligibility in an individual hiring transaction must include provisions for government certification of such eligibility. Such provisions would be necessary whether the system were based on an ID card or on call-ins to a work authorization data bank. If an employment ID card or an upgraded social security card is to be used to establish eligibility, the issuing authority must, in order to prevent fraud, check the legitimacy of an application for such a card. This inevitably entails checking with various government data systems, and raises serious concerns about the *de facto* development of a centralized procedure for retrieval of data by the government. Additional concerns are raised by suggestions that a new work-authorization data bank be created. Such a data bank would, over time, accumulate significant amounts of information about employment histories in addition to personal information about job applicants.

Proposals for a card system also create a danger of abuses in law enforcement. (See Section IV A(2)(a); Section III). Proponents of a card system for establishing eligibility have argued that such a danger can be eliminated by limiting the use of the card to the employment context. Experience suggests that such a limitation will not be honored in practice. Many forms of identification are already put to unanticipated uses. Hispanic citizens and resident aliens in certain areas are already accustomed to the threat of arrest or harassment on the basis of their ethnic characteristics, and for failure to present a "green card". Many already feel the compulsion to carry ready identification. The actual existence of a universal document perceived as attesting to legality of status will inevitably result in its emergence as an instrument of police identification, regardless of legal prohibitions on its use for such purposes.

This is intolerable in a free society. The practical usefulness of such a document in the enforcement of immigration laws will encourage enforcement officers to disregard legal strictures on its use for such purposes. Furthermore, the standards for a lawful stop and interrogation enunciated by the United States Supreme Court in U.S. v. Brignoni-Ponce establish that ethnic identity is a legitimate factor in "reasonable suspicion", which is itself the basis for a legal stop and interrogation.[28] Even if there were no deliberate misuse of the card by enforcement officers, Hispanic and other lawful residents of foreign appearance will perceive that the card is a ready means for minimizing the unequal burdens that are placed upon them under the standards enunciated by the Supreme Court. Not only Hispanic Americans and ethnically distinguishable minorities, but all Americans, stand to lose much under a system which in practice creates strong incentives for particular ethnic groups to carry an identification document at all times, suggestive as this is of internal passes and passports required in totalitarian countries.

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[28] U.S. v. Brignoni-Ponce, 422 U.S. 873, 881 (1975).

Perhaps the most pernicious effect on civil liberties of any of the work authorization mechanisms is the fundamental fact that each creates a new system for direct government control of the right to work. A person's work is the prerequisite to his or her pursuit of any other social goods constitutionally guaranteed to him or her, such as life, liberty and property. While the government currently regulates working conditions it does not purport to control an individual's basic ability to seek employment. It seems highly inadvisable to confer power over such a fundamental right to the government.

The idea of allowing government interference with a matter so fundamental to the individual's well-being is itself deeply troubling, and at odds with the fundamental values upon which our society is founded. Nor can one ignore the danger that the government may use such power for purposes of political control or economic policy. Most alarming of all, however, is the certainty that no bureaucracy for certifying the right to work will be foolproof. There will be inefficiencies and mistakes. This will create uncertainty in actual hiring decisions as well as unfairly deny some persons the certification to which they are entitled. Such extra burdens on the right to work of citizens unfortunate enough to fall foul of bureaucratic inefficiency are intolerable.29/

29/ Such defects might be mitigated, albeit insufficiently, by a fair and sufficient appeals mechanism. However, no appeals mechanism can compensate a citizen for the losses and burdens she sustains while waiting for it to complete its process. Furthermore, such an appeals mechanism is extremely unlikely to be implemented in view of the costs that it would entail if it were to be fair and sufficient.

It is not difficult to understand why the issue of a work authorization system caused the sharpest division of opinion in the Select Commission's deliberations. On the one hand, an employer sanctions system, in order to be effective, predictable or non-discriminatory, requires a secure system of identification. On the other hand, even if security were attainable, fundamental personal liberties would be endangered by such a system. Such dangers are not justified by an ill-conceived, and most likely ineffective, employer sanctions system.[30]

B. Ineffectiveness of Employer Sanctions Legislation

The preceding discussion indicates that an employer sanctions system will give rise to serious problems of discrimination against minorities, interference with business decisions, and civil liberties violations. While a system which creates such problems should be opposed under any circumstances, it is especially objectionable since it will probably be ineffective and virtually unenforceable. For example, while the Select Commission recommended the targeting of large businesses for enforcement efforts, it did so without referring to the realities which make this an appropriate method for targeting. It is by no means self-evident that such businesses are the most significant employers of undocumented workers. If this is an unjustifiable assumption, then it will, to an indeterminate extent, render ineffective the enforcement of employer sanctions.

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[30] The civil liberty issues raised by the Select Commission's recommendations have been more extensively addressed in the work done by the American Civil Liberties Union on this subject. See Testimony of John Shattuck, Joint Hearings Before the Subcommittees on Immigration and Refugees of the Senate and House Judiciary Committees May 6, 1981; Memoranda from John Shattuck to Father Theodore Hesburgh, Chairman, Select Commission on Immigration and Refugee Policy, December 2, 1980.

An extensive analysis of the civil liberties dangers of the mechanisms for work authorization is presently being prepared by an ACLU volunteer attorney, and will be available within two months.

It is also necessary to consider the likehood that, in criminal prosecutions, one may expect overburdened U.S. Attorneys to exercise considerable prosecutorial discretion in decisions about when and whom to prosecute. The effect of this factor on the scheme's effectiveness may well be radical. It is also important to consider how juries will behave if criminal sanctions are imposed. It is certainly possible that local sentiment in communities with a history of or perceived need for employing undocumented workers will result in an unwarranted proportion of acquittals. This would have a critical effect on the actual success of employer sanctions.

If a system of graded civil penalties is to be relied upon for effective enforcement of employer sanctions, then it is necessary to look at the capacity of existing regulatory agencies to sustain such an effort. There is simply no practical consideration in the Commission's Report of how much civil enforcement will be necessary to effectively deter lawbreakers, and of the effect of such an effort on the other duties of the agencies concerned and on their budgets.

One must also ask what likelihood there is that employer sanctions will, rather than deterring employment of undocumented workers, be internalized as a business cost, to be passed on to the consumer in the form of higher prices or to the worker in the form of lower wages. It seems likely that any but an extremely harsh penalty will be so internalized, particularly by those who regularly hire undocumented workers for reasons of profit. On the other hand, if sufficiently harsh penalties are adopted, they will necessitate expensive enforcement efforts in pursuit of a scheme whose effectiveness and value remain uncertain.

Among the primary reasons why sanctions will probably be ineffective is that they will likely prove to be extremely difficult and expensive to enforce. To the extent that employers employ undocumented aliens because they will work for less than minimum wages and under less than legally adequate working conditions, employers have a financial incentive to violate the employer sanctions legislation and to continue to hire undocumented aliens. Such employers are therefore unlikely to comply with the law unless massive enforcement efforts are implemented. However, such efforts would be expensive and would be hampered by constitutional limitations on the power of government officials to detain employees for investigative questioning, to search business establishments for undocumented workers, or to examine the records of employers. Furthermore, efforts to enforce employer sanctions legislation may interfere with effective enforcement of existing immigration laws. Even more important, attempts to enforce employer sanctions legislation may lead to violations or erosion of the constitutional rights of minority employees.

An examination of current INS enforcement methods will be helpful to an evaluation of the enforceability of employer sanctions legislation. In enforcing existing immigration laws, the INS often obtains consent from employers before searching their places of business for undocumented workers.[31] Having thus obtained legal access to the business premises, INS officers proceed to question the employees concerning their right to be or to work in this country.[32] The authority of INS officers to engage in such questioning is, however, limited by the Fourth Amendment of the United States Constitution.[33]

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[31] See e.g., An Yi Lau v. INS, 445 F.2d 217, 219, 223 (D.D.C.), cert. denied, 404 U.S. 864 (1971).

The scope of Fourth Amendment restrictions on actions of government officials depends upon the degree of restraint to which the person interrogated is subjected.[34] If no restraint is involved, the questioning of a cooperative person who voluntarily submits to the questioning may be justified by a reasonable suspicion, based on specific articulable facts together with rational inferences from those facts that the person questioned is an alien.[35/] If, however, the person interrogated has been detained even temporarily by force, threat of force, or a command based upon the agent's official authority, he has been "seized" within the meaning of the Fourth Amendment, and the questioning cannot be justified unless the officer has a reasonable suspicion based on specific articulable facts together with rational inferences from those facts that the person questioned is unlawfully present or unlawfully working in this country.[36/] A person has been forcibly detained, or "seized", when his liberty to depart has been restrained and he has become aware that his liberty has been restrained.[37/] Therefore, when INS officers surround a place of employment during an area control operation, the employees within are forcibly detained, or "seized," only if they would be restrained if they attempted to leave and if they are aware that they would be so restrained.[38/]

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[32] See e.g., id. at 219-20. INS officers have statutory authority to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." Immigration and Nationality Act of 1952, 8 U.S.C. § 1357 (a)(1)(1976).

[33] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[34] The Supreme Court has expressly reserved for future decision the question of whether INS officers must have a "reasonable suspicion" that a person is unlawfully present in this country before stopping and interrogating him in a place of employment or other public place in non-border areas, or whether a reasonable suspicion that he is an alien is sufficient. U.S. v. Brignoni-Ponce, 422 U.S. 873, 884 n.9 and accompanying text (1975). However, lower courts, in considering which of these two standards applies, have focused on the degree to which the individual is restrained when interrogated by an INS officer. At least one case, however, has taken a novel approach and simply looked to see whether the interrogation was "reasonably related in scope" to the agents' suspicion. See Lee v. INS, 590 F.2d 497 (3d Cir. 1979).

[35/] Illinois Migrant Council v. Pilliod, 548 F.2d 715, 715 (7th Cir. 1977)(order entered upon rehearing en banc), modifying, 540 F.2d 1062 (1976). Shu Fink Cheung v. INS, 476 F.2d 1180, 1181-82 (8th Cir. 1973); Cheung Tin Wong v. INS, 468 F.2d 1123, 1126 (D.C. Cir. 1972); An Yi Lau v. INS, 445 F.2d 217, 222 (D.D.C.), cert. denied, 404 U.S. 864 (1971). Contra, Marquez v. Kiley, 436 F.Supp. 100, 113-14 (S.D. N.Y. 1977)(casual, non-restraining inquiry between armed immigration official and person suspected of alienage is unlikely in real life. Therefore, an officer must have a reasonable suspicion that an individual is unlawfully present in the U.S. before approaching that individual to inquire into his citizenship status).

[36/] Illinois Migrant Council v. Pilliod, 548 F.2d 715, 715 (7th Cir. 1977)(order entered upon rehearing en banc), modifying, 540 F.2d 1062 (1976); Cheung Tin Wong v. INS, 468 F.2d 1123, 1126-27 (D.C. Cir. 1972). An Yi Lau v. INS, 445 F.2d 217, 223 (D.D.C.), cert. denied, 404 U.S. 864 (1971).

[37/] Yam Sang Kwai v. INS, 411 F.2d 683, 686 (D.C. Cir. 1969).

[38/] Id.

This legal framework obviously has serious implications for the rights of members of minority groups. While race or apparent national origin alone are insufficient to create a reasonable suspicion of alienage or illegal presence in this country, they are relevant considerations justifying interrogation or incidental brief detention, when coupled with other circumstances such as appearance, dress, location, ability to communicate, etc.[39/] It is, therefore, much easier for an INS officer to show that he had a reasonable suspicion that a member of a minority group was an alien than to make the same showing with regard to a white individual. INS officers can, therefore, more easily justify an initial, non-restraining questioning of a member of a minority group. This may encourage INS officers to question only members of minority groups. Moreover, if these individuals attempt to avoid questioning in such a non-restraining situation, that attempted avoidance may be treated as evidence that they are illegally present or illegally working in this country and may, therefore, justify forcibly detaining them for interrogation.[40/]

This same discriminatory effect that occurs in connection with enforcement of existing immigration laws is bound to occur when employees are questioned for the purpose of obtaining evidence that

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[39/] E.g., U.S. v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975); Cheung Tin Wong v. INS, 468 F.2d 1123, 1127-28 (D.C. Cir. 1972).

[40/] See An Yi Lau v. INS, 445 F.2d 217, 223 (D.D.C.), cert. denied, 404 U.S. 864 (1971)(fact that orientals attempted to flee when INS officers arrived at their place of employment created a reasonable suspicion that they might be undocumented aliens and, therefore, justified their temporary detention for interrogation).

employers are hiring undocumented workers in violation of employer sanctions legislation. In fact, the discriminatory impact of employer sanctions legislation may be even worse because evidence obtained in violation of the Fourth Amendment rights of an employee may still be used against an employer whose constitutional rights were not violated.[41/] INS officers may, therefore, decide to disregard the rights of employees even though this would mean that the evidence obtained could not be used in deportation proceedings against those employees.[42/] These officers may be satisfied with using the evidence against employers.[43/] They may, therefore, simply detain and question all "foreign-looking" employees. Thus with respect to enforcement of employer sanctions legislation, members of minority groups would not even benefit from the minimal protection against intrusive searches and interrogations which is afforded them with respect to enforcement of existing immigration laws.

Even so, enforcement of employer sanctions legislation will be much more difficult than enforcement of existing immigration

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[41/] Rokas v. Illinois, 439 U.S. 128, 133-34 (1978)(Fourth Amendment rights are personal rights which may not be asserted vicariously); Alderman v. U.S., 394 U.S.; 165, 174 (1969)(same).

[42/] See Klissas v. INS, 361 F.2d 529 (D.C. Cir. 1966)(irregularity cured by voluntary admissions at hearing).

[43/] The possibility of incurring civil liability for violating the Fourth Amendment rights of the employees may deter INS officers from violating these rights. Efforts to obtain money judgments for damages against immigration officers and the INS for improper interrogation offenses, however, have thus far not prevailed. Immigration Law and Procedure, Gordon and Rosenfield, Vol. 1A p. 5-20 n.7.2 and accompanying text.

laws and will seriously interfere with the enforcement of those existing laws. Currently, enforcement of immigration laws is simplified by the fact that many employers consent to INS searches and it is therefore unnecessary for INS to obtain search warrants in many cases. Obviously, however, employers are unlikely to be so cooperative when the evidence gained from the search is to be used not only to deport undocumented workers, but also to show that the employer is himself liable for violations of employer sanctions legislation. INS officers, therefore, will probably have to begin obtaining warrants[44/] for almost all searches conducted to enforce either existing immigration laws or employer sanctions legislation.

The burden of obtaining these search warrants is likely to make effective enforcement of both existing immigration laws and employer sanctions legislation almost impossible. There are two reasons for this. First, the INS will usually be unable to meet the requirements for obtaining a search warrant. Second, the

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[44/] Search warrants for INS area control operations have generally been obtained under Rule 41 of the Federal Rules of Criminal Procedure, which, prior to Aug. 1, 1979, authorized warrants to search for and seize property. Recently, however, there has been disagreement over whether that rule could be used to authorize searches for persons. Compare ILGWU v. INS, (C.D. Cal. 1979)(Rule 41 search warrant may be used to enter a factory and seek out undocumented workers) with Blackie's House of Beef, Inc. v. Castillo (Blackie's I), 67 F.Supp. 170, 173 (D. D.C. 1978)(because Rule 41 only authorizes warrants to search for property, it cannot be used to authorize a search for persons). This dispute, however, may have been put to rest by an amendment to Rule 41 which took effect on Aug. 1, 1979, and which authorized issuance of criminal search warrants to search for and seize any person for whose arrest there is probably cause. At any rate, the INS can avoid using Rule 41 by invoking the court's general jurisdiction under the INA to order a search for undocumented aliens. See Blackie's House of Beef, Inc. v. Castillo (Blackie's II), 480 F.Supp. 1078, 1081 (D. D.C. 1979)(search of restaurant).

authority of the INS to apprehend undocumented employees of the business establishment searched will be more narrow under a search warrant than pursuant to the employer's consent to the search of his business establishment.

The INS will usually be unable to meet the requirements for obtaining search warrants because the tips it relies on in planning its area control operations are usually anonymous and usually do not name specific undocumented workers who are present at a particular business establishment.[45/] Anonymous tips of this sort are not sufficient to obtain a search warrant. Such may be considered by a magistrate only where independent corroborative information or underlying circumstances which support the affiant's belief that the information is credible, establishes the existence of probable cause to believe that a violation of law has occurred.[46/] The reliability of an informant and of his information cannot be determined where the informant is anonymous, and the information cannot be independently corroborated because it is not specific; therefore, a warrant cannot be obtained.[47/] Moreover, to be valid,

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[45/] Golden Door at 86.

[46/] U.S. v. Harris, 403 U.S. 578 (1970); Aguilar v. U.S., 378 U.S. 108 (1964); Jones v. U.S., 362 U.S. 257 (1960).

[47/] Golden Door, p. 86 n.54. Similarly, warrantless searches based only on unverified telephone tips from unknown persons have been found to be without probable cause and, therefore, unconstitutional. Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

a search warrant for persons must identify with particularity the allegedly deportable persons who are the subject of the search.[48] Because the INS usually relies on tips that do not specify this information, it will usually be unable to obtain a warrant.

This inability on the part of the INS to obtain search warrants will seriously impede enforcement of existing immigration laws. Furthermore, there is no reason to believe that the tips that INS will receive about violations of employer sanctions legislation will be any more specific or less anonymous than the tips it receives about violations of existing immigration laws. It is, therefore, probable that the necessity of obtaining warrants will be as great a barrier to effective enforcement of employer sanctions legislation as it will be to effective enforcement of existing immigration laws.

Even in those few cases where the INS is successful in obtaining a search warrant, the authority of its officers to apprehend undocumented employees of the business establishment searched will not be as broad as it would have been if the employer's consent to the search could have been obtained. As discussed above, if the employer's consent to the search is obtained, INS officers may question unrestrained employees whom they reasonably suspect of being aliens and may forcibly detain and question employees whom they reasonably suspect of being or working in this country illegally. Moreover, if this questioning gives rise to probable cause to believe that the individual questioned is an undocumented alien, and if there is a reasonable basis for believing that the individual is likely to escape before a warrant can be obtained, the individual can be arrested without a warrant.[49] A search warrant, however, does not confer upon INS officers a roving commission to search the premises.[50] INS officers who enter a business establishment pursuant to a search warrant for persons may search only for those persons particularly identified in the search warrant. Failure to identify the persons sought with sufficient particularity cannot be cured by application of the "plain view" doctrine after the INS legitimately gained access to the place of business, if the INS knows when it applies for the warrant that it intends to search for persons not identified in the warrant.[51] The authority of INS officers to apprehend undocumented workers is, therefore, limited to those undocumented workers particularly identified in the search warrant; however, if the employer's consent to the search can be obtained, INS authority is not so limited. Employer sanctions legislation, therefore, by encouraging employers to refuse to consent to INS searches, would prevent effective enforcement not only of the employer sanctions legislation itself, but also of existing immigration laws.

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[48] Blackie's House of Beef, Inc. v. Castillo (Blackie's II), 480 F.Supp. 1078, 1083 (D. D.C. 1979). The warrant in Blackie's II did not contain any names or even physical descriptions of the allegedly deportable aliens. Id. at 1088. It simply authorized the INS to "locate aliens in the U.S. without legal authority."

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[49] *E.g.*, *Yam Sang Kwai v. INS*, 411 F.2d 683, 687 (D.C. Cir. (1969).

[50] *Blackie's House of Beef, Inc. v. Castillo (Blackie's II)*, 480 F.Supp. 1078 (D. D.C. 1979).

[51] *Id*. at 1083.

It is possible, however, that enforcement of employer sanctions legislation might be made easier by a warrant procedure based upon an administrative inspection theory. For purposes of enforcing existing immigration laws, a search of a business establishment cannot be justified on an administrative inspection theory because the employer has not impliedly consented to the search by entering a regulated business.[52/] It is possible, however, that employer sanctions legislation could be viewed as a regulatory statute which makes all businesses that employ employees regulated businesses. Warrants would then be obtainable on an administrative inspection theory because the employer would have impliedly consented to the search by entering a regulated business.

To obtain a warrant to make an inspection to enforce a regulatory statute, it is not necessary to demonstrate probable cause to believe that conditions in violation of the regulatory statute exist on the premises.[53/] For purposes of an administrative search, the issuance of a warrant may be based on a showing that reasonable

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[52/] Blackie's House of Beef, Inc. v. Castillo (Blackie's I), 467 F.Supp. at 174 (restaurant).

[53/] See Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978) (discussing Secretary of Labor's constitutional duties with respect to inspections to enforce OSHA).

legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.[54/] A warrant showing that a specific business has been chosen for a search on the basis of a general administrative plan for the enforcement of a regulatory statute derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.[55/] If the administrative inspection theory were accepted, INS would be able to obtain warrants to search business establishment to determine compliance with employer sanctions legislation.

Such a relaxed warrant procedure, however, would vastly increase the discriminatory impact of employer sanctions legislation. The easier it is for INS to obtain warrants, the more necessary it becomes for employers to take steps to avoid the expense, inconvenience, and danger of prosecution that may result from being inspected. Employers may conclude that the best way to do this is to avoid hiring minority workers because this will make them less likely to be targeted for inspection in the first place, and

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[54/] *Id.* at 320; *Camara v. Municipal Ct.*, 387 U.S. 523, 538 (1967).

[55/] *Marshall v. Barlow's Inc.*, 436 U.S. at 321.

will tend to make inspections less time-consuming when they occur because there will be fewer foreign-looking workers for officials to question. Moreover, discrimination by INS officers against members of minority groups will be increased because an administrative warrant would not be required to describe with particularity the undocumented workers sought. INS officers, therefore, would probably have authority to question any employee they found on the premises. This authority would probably be limited only by the requirements that INS officers have a reasonable suspicion that an unrestrained individual is an alien before questioning him concerning his citizenship status and that the officer have a reasonable suspicion that the individual is unlawfully present or working in this country before forcibly detaining him for further questioning. As has been shown above, however, these requirements provide very little actual protection to minority employees, and, in fact, may encourage discrimination against members of minority groups.

Employer sanctions threaten to be ineffective and to harm the interests of employees and employers, and indeed of society as a whole. It will also be extremely expensive to establish and sustain the regulatory machinery which will monitor compliance with employer sanctions. The enactment of such legislation is therefore highly inadvisable, at least until the many unanswered or troubling questions have been adequately disposed of. To enact employer sanctions legislation on the basis of the present record would be inconsistent with principles of well-informed decisionmaking.

V. CONCLUSION

The Select Commission's recommendations on enforcement options suffer from several weaknesses. There is no clear statement of the problems assumed to result from illegal immigration. Even if it is assumed that some such problems result, there is no clear indication of how the recommendations will have their intended effect of curbing illegal immigration. The package recommended by the Commission is not cost-effective. It is clear that it will entail the expenditure of substantial government funds for enforcement efforts, will impose economic costs on employers, and will pose dangers to fundamental social values. Particularly troubling is the pervasive effect that employer sanctions will almost certainly have on the conduct of business operations and on the interests of workers, particularly minority workers. However, there is no indication that the recommendations will provide the results sought. Therefore, we propose that the recommendations be rejected; that the dynamics of migration to the U.S. be more clearly established; and that more appropriate and cost-effective measures be devised to meet the problem.

Of the three enforcement measures recommended by the Select Commission - increased enforcement of existing labor laws, increased enforcement of existing immigration laws, and employer sanctions legislation - the only one that is well advised on the basis of the present record is increased enforcement of existing labor laws. Increased enforcement of existing immigration laws will lead to increases in the incidence of abuse and humiliation of members of minority groups. Employer sanctions legislation will cause employment discrimination against members of minority groups and will jeopardize civil liberties values. Moreover, there is reason to believe that such legislation would not be effective in creating more jobs for those legally entitled to work, or in raising wages and working conditions, or in preventing illegal immigration. There is also reason to believe that it would instead create a pariah class, excluded from the social and economic mainstream. This would create problems for community order and health.

In contrast, increased enforcement of existing labor laws would not result in discrimination and would be effective, at least to the extent that undocumented aliens are employed at less than the minimum wage or under less than legally adequate working conditions. While such an enforcement policy would not be completely effective in dealing with the problem of illegal immigration, the degree of its likely effectiveness must be compared to the degree of effectiveness promised by employer sanctions or conventional enforcement efforts. It is also worth noting that the enforcement of labor laws for purposes of immigration policy will have significant additional benefits for the wages and working conditions of all workers. It is essential to ask how effective a labor law enforcement approach to the problems of illegal immigration might be if it were provided with the extensive resources now proposed for employer sanctions.

Efforts should also be made to develop international aid and investment policies that will minimize pressures to migrate from the sending countries. Above all, there must be a clear recognition that the present decision-making record has been deficient in basic factual and theoretical research, and that the conclusions drawn by the Select Commission do not represent rational responses to such a factual record as does exist. Enforcement of wage and working standards legislation might be practiced as a stop-gap measure of proven effectiveness but unproven reach, while efforts continue to develop meaningful and useful basic research and reasoning. To approach such complex problems in any other way would be to do a gross disservice to the national interest of the United States.

Amit Pandya
Vivian Berzinski
Douglas L. Parker

Senator SIMPSON. Well, I thank you very much.

Let me ask you kind of an interesting question. With just a brief response now, without getting into a long spectrum of philosophies or judgment calls and so on, let me ask each of you if you would very briefly, within, say, a minute—and I will not set the clock—describe how serious a problem you perceive illegal immigration in the United States to be? How is that for a question? How serious is this issue of illegal immigration in the United States?

Mr. MILLER. I would qualify it as very, very serious, especially its implications over the long run. You have a veritable underclass developed that is exploited. There is rampant abridgement of the law. Illegal aliens may provide benefits for some relatively small class of employers but is a serious problem which has to be dealt with and has to be dealt with right now.

Senator SIMPSON. Mr. Briggs.

Mr. BRIGGS. I would echo almost exactly the same views. I see it as an extremely serious problem, especially because the people it affects are the ones who, as citizens in our own labor force, are the ones who are in greatest need of protection in terms of work opportunities. I see it as there being a significant labor market impact. I think displacement is very real. I think illegal immigration does force citizen workers out of the labor force who would otherwise be in the labor force. It discourages some of them from looking for jobs.

I think it does set up the longrun potential for an underclass, which we are in the process of now institutionalizing by law by saying that illegal immigrants cannot have food stamps, social security, AFDC, unemployment compensation.

There is an effort in Texas, where I lived for a long time, to exclude children of illegal immigrants from going to public schools. It was in Texas that I got into this issue in the first place. There was an effort to try to help organize farmworkers in south Texas in the late 1960's. It was soon clear that there was no chance to do that as long as the borders were wide open. The effort was completely decimated.

I think it is an extremely serious issue. And I might also add that I think that the numbers are far greater than what the Select Commission reported. By relying upon the average figures cited by the Census Bureau—an average that was simply a median of studies done back in the mid-1970's, which placed the number of illegal immigrants somewhere between 3.5 and 6 million persons, it did a disservice. I think that is a wonderful report, but that this range of numbers has been picked up by many people in the public without understanding that all those studies were done way back in the mid-1970's and all the Bureau did was strike a median of all the figures in the reports. They did nothing original themselves. So the actual number in 1981 is certainly much larger.

Senator SIMPSON. Mr. North.

Mr. NORTH. Senator, I think it is a serious problem, and I think it requires serious steps. I know that there are plenty of people, including many witnesses, who worry about the tradeoff between seeking to solve the problem and creating other problems in the course of seeking that solution.

I would suggest that in addition to the problem which has been mentioned earlier about the labor market, which I have written about at some length, there also is the question of the almost invisible, very serious but very difficult to measure, impact on the Treasury.

I am thinking about particularly the most difficult of those impacts to measure, which is what happens to the legal resident worker who is eligible for various income transfer programs who is actually shouldered out of a job in the U.S. labor force. It does not happen every time an illegal is employed, but it happens often enough to be of concern. That legal resident of the United States is eligible for and generally seeks unemployment insurance, later on perhaps food stamps, later on perhaps AFDC. That is a very real problem.

Mr. PARKER. Senator, I am not an economist, so I would not be able to answer your question in terms of effect on the economy. I think illegal immigration is a serious problem. I think it has created, or around it has been created, an atmosphere of panic and hysteria that I am very concerned about. I think I am almost as concerned about that as I am about whatever the economic effects would be.

There is a real risk of claiming, "My God, we have to do something." We have heard that, I think, today, and we have heard it for a year or so. People say here is a serious problem and here are all these foreigners coming in, coming in with boats and everything, and the feeling is that somehow we have to do something. That troubles me to the extent that illegal immigration creates that atmosphere of hysteria. I think that we are trading off a great deal. I think I would be very careful about that.

Senator SIMPSON. Your responses are thoughtful and quite firm. I appreciate that. I perceive that the conditions are now present to assure that something will be done. That is why I and the chairman of the House committee want to harness this energy to be sure that what is done is right, whatever that may be.

Never have the constituencies been so clearly formed, where you have for the first time in many years the labor movement wanting to do something, blacks wanting to do something, other minority groups wanting to do something, people wanting to do something for the very worst reasons, people wanting to do things for the very best reasons, environmental groups suddenly alert to the situation.

Indeed, our purpose is not so much to see that something gets done—because it is going to get done, something is going to happen, some legislation is going to go on the books. The purpose of this subcommittee is to be sure that what is done is done for the right reasons and by appropriate means.

I was interested, Professor Miller, in your international viewpoint. Why were employer sanctions originally enacted in Germany and France and other countries? And why has Germany recently proposed to increase the amount of the fine? I would be interested in that. Was there any public opposition to the enactment of those policies in those countries? Has there been opposition or resentment by either employers or individuals alleging discrimination since the enactment of employer sanctions? I would be interested in that as you perceive it. How is that for a loaded one?

Mr. MILLER. In 1 minute?

Senator SIMPSON. Yes; you have 30 seconds in which to answer that.

Mr. MILLER. First of all, I think there are three factors that can explain why employer sanctions came into force in the mid-1970's. One is the recruitment halt caused by a souring of perceptions of the guest worker programs which had been instituted earlier, but also by the general economic depression.

Two was the passage by the International Labor Organization of the convention concerning migrants in abusive conditions, convention 143 in 1975. The European governments generally have been responsive to that convention.

And the third factor was a politicization of foreign worker policies in virtually all Western European states.

Now, concerning opposition to employer sanctions, no. There is a broad consensus in European societies that this is the way to go. Even the employer groups backed employer sanctions.

And concerning the third factor—has this resulted in additional discrimination against minority groups—I know the French situation quite well, where there is a large citizen minority group made up of citizens of North African, Caribbean, and sub-Saharan African descent. And there are serious problems of discrimination and racism in France, but it does not appear that employer sanctions have resulted in additional discrimination against these disfavored minorities in French society.

Senator SIMPSON. Thank you very much. I was interested in that. I seem to come to the conclusion that if an employer is engaged in discrimination and doing that and in his known or unknown ways, regardless of what we put on the books, he is going to continue to do that. That is my view, although if we provide a secure way for applicants to show their work authorization, employers would certainly not be able any longer to use uncertainty about work authorization as an excuse. In that sense discrimination might even decrease.

Mr. MILLER. Senator, the French see employer sanctions in a different view than we do here in the United States. I think that most labor representatives, for example, see employer sanctions as lessening discrimination, the discrimination which employers wield over illegal aliens. The French feel that if they can stem this illegal alien problem, then this will lessen discrimination in their society.

Senator SIMPSON. Professor Briggs, you testified that there must be, you used the phrase "sufficient penalties" imposed upon employers who would violate employer sanctions laws. What do you regard as "sufficient penalties," meaningful penalties?

Mr. BRIGGS. Well, I think that the minimum would be $1,000 per alien. If I understand what the Carter administration proposed in their reform message, I think that was their minimum. In this regard, I was doing some recent reading about the Alien Contract Labor Act of 1885. The penalty then was $1,000 for each violation of the act per person. That was 100 years ago. I think if one applied a price index on what Congress thought it was severe enough to impose $1,000 in 1885, the comparable figure would at least be $25,000 now. I think the principle of the act is somewhat similar to what is being proposed. The penalty has got to be severe. I feel this because I worry about whether the legal system will take employer sanctions seriously or not. And I elaborate on that more in my testimony.

My greatest fear with employer sanctions is that even if we pass it, the legal system will simply say, "We are going to ignore it. We are not going to penalize employers," or "We have overcrowded court dockets that are filled with murders and rapists and everything else to deal with," and this is going to be very low on the agenda of action.

Unless the penalties are strong enough to make prosecution seem worthwhile to get involved in, I think they are likely to just ignore it. So I would certainly say $1,000 as a minimum. But I am not a lawyer to know how that fine would be relative to other commensurate types of crimes.

Senator SIMPSON. We are going to pursue that. There has been some testimony and some materials presented stating that the first two penalties should be civil in nature, in the form of fines, and then for a persistent pattern and practice, if we can get this defined properly, these could be criminal penalties. So that is a possibility. We have to be cautious there.

Mr. North, you are perceptive enough to know that there are certain portions of the administration's program that I have difficulty with and, you know, we are going to proceed. We have permission here to do Congress' pitch on immigration and refugee policy reform.

Certainly, the administration personnel that we have dealt with in the State Departmment and particularly in the Department of Justice, have been more than helpful and cooperative and understand where we are headed and understand the political realities of our congressional impetus. Part of their program consist of additional INS and Labor Department investigators. And I inquire, how much more effective will be their sanctions program which utilizes existing documents, than use of a program with the increased number of investigators but no sanctions?

Mr. **NORTH**. Well, if you did increase labor law enforcement, which I think probably is a good thing, and if you interior or labor market enforcement of the immigration law, what you would need is not more legislation but simply more appropriations. So perhaps it is attractive from that point of view.

Second, what would be done in terms of labor law enforcement presumably would be to make it a little less profitable for some employers of illegal aliens to continue to employ them at below minimum wages. There is a substantial body of evidence that suggests that the majority of the illegal immigrants are being paid at or above the minimum wage.

The continued displacement of legal resident workers from legal jobs, above minimum wage jobs, by illegal aliens would not be affected at all by improving the enforcement of the Fair Labor Standards Act. FLSA enforcement is a good thing in and of itself, but it does not meet this particular problem.

The additional enforcement of the immigration law itself by more labor market investigations, more farm and ranch checks, would be helpful. But it would not take care of the problem of equity in the labor market that I mentioned before, in that the illegal immigrant employee would be the only one penalized.

I welcome one or both of those steps, but I am not sure that that is all that is necessary.

Senator **SIMPSON**. Mr. Parker, you have stated that there may be a problem of access for certain legal workers if the card—if we go to a card—is an upgraded counterfeit-resistant, tamperproof social security card. How would a problem of access develop with use of that method?

Mr. **PARKER**. I think what you would need to address, Senator, is how does someone get that card in the first place. I, for example, do not have my social security card anymore, but I suppose I could come up with something if I needed to get a card and prove that I was here legally.

A young kid applying for a card might not have any of those things. That conceivably could have a disparate impact on people who are at the lower economic strata of our society. I think the question that has never been addressed is how do you get into that system, who do you go to? Do you go to the INS? Do you go to the Department of Labor, the local employment service, or whoever? What procedures are there to prevent the use of forged documents to obtain a nonforeable ID card.

The question, I think, is whether we are going to have people go and say to the D.C. Government if they live in the District to get one of these cards. And thus someone who is a middle-class white college student has a better chance of getting one of those cards than someone who is a lowerclass black unemployed person who is out of school.

It seems to me there is a preliminary assumption behind that whole card system that we just have not addressed yet. And I think you are quite right in thinking that the card system has got to be explored. There are some obvious problems with it, but I am not sure we have really gotten to all the subsidiary problems that it raises.

I would agree, incidentally, with Professor Briggs' comment about the questions of enforceability. My testimony deals with that to some extent. There is a whole series of questions, whether we have a system like the administration's or a system with the card, about burdens of proof, warrants to get in to inspect an employer's place of business, what sort of standard of liability you would have.

Those are difficult questions, and I think even if we assume that people come here to get jobs, and even if we assume some of the other problems that may exist in illegal immigration, we cannot necessarily assume that an employer sanctions system is going to prevent all those bad things from happening. There are a lot of other things to address.

Senator SIMPSON. Well, this is very true. As you have heard—and we will conclude here in a just a moment—how quickly we come back to doing something with the existing social security card. That seems to be something that we seem to gravitate toward. Indeed that may be what we will ultimately come up with.

Interestingly enough, the Social Security Administration system is not exactly overenthused about that.

But before benefits are paid there comes sitdown time when workers actually go to a live human being employee of the Social Security Administration and produce work records and history of employment and so on. At that point the weed-out comes—thank heavens—because that is when the payoff comes. That is the benefit system.

I think that I am convincing some of them, or hope to, that even though it is true, that they do not have to be too deeply concerned about social security cards, the real issue is that that card has become a talisman of authenticity in America, and in that sense is being terribly, terribly abused.

You are very important parts of the continuing process, as you have been in the past, and we appreciate your being available and your diversity of opinion. And we thank you.

That will conclude the hearing today. We will have a hearing Friday on employer-employee identification systems, verification systems, identifiers. That should be spirited.

Thank you very much for your participation.

I would say that members of the subcommittee will be presenting written questions to you, and if you would, please respond to those in an appropriate fashion. And I will have some additional written questions not only for this panel but previous panels and wish the record to so disclose.

Thank you for your participation.

The hearing is concluded.

[Whereupon, at 5:00 p.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The "Scorched Earth" Approach to Immigration Control

by Charles Duryea Smith* and
Juan Ernesto Mendez**

I. Introduction

The United States has experienced a new wave of immigration during the past few years. Immigration is a deep-rooted part of America's history, yet it presents today a somewhat different face. Large proportions of the recent non-European arrivals are refugees fleeing persecution in their homelands. An unverifiable number of others enter without inspection or are nonimmigrants who overstay their visas and wish to remain permanently. The presence of these aliens against the backdrop of the United States' current economic problems has spotlighted the debate over U.S. immigration policies as a fundamental and pressing issue facing the nation. The debate is likely to become increasingly heated and to involve diverse organizations and individuals who previously have not voiced opinions on immigration because, in 1978, the Congress and the President created the Select Commission on Immigration and Refugee Policy and charged it with analyzing immigration impacts and formulating recommendations for reform in the area.[1] The Select Commission will report to the Congress and the President by March 1981.[2] Regardless of its recommendations, termination of the Select Commission will resituate immigration policy squarely in the public arena.

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[1] Immigration and Nationality Act—Refugee Policy, Pub. L. No. 95-412, § 4, 92 Stat. 907 (1978) (codified at 8 U.S.C. § 1151 note (Supp. III 1979)).

[2] SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, UNITED STATES IMMIGRATION POLICY AND THE NATIONAL INTEREST (March 1981). The report was released just before this article went to print. The proposals in this article differ from many of those proposed by the Commission, so it should be referred to especially in the area of Employer Sanctions, which the Commission recommended.

Broadly speaking, the federal government controls migration into the United States by concentrating on three places. First, to create legality and to prevent illegality, it erects barriers outside the United States by requiring visas for foreign visitors and immigrants, establishing their terms and conditions, and then screening applicants. Second, the government places control mechanisms at the border by designating certain locations, including interior international airports, as ports of entry at which all foreign arrivals are inspected for legal admission and by patrolling the land borders to apprehend persons trying to enter undetected. Third, the government operates in the interior of the United States to apprehend persons in the country illegally and to deter them and others from entering and staying in contravention of the law. It is this third area of interior deterrence which this article addresses.

Immigration policy is not stated and implemented solely through the Immigration and Nationality Act (INA).[3] Reform efforts should therefore encompass more than the overhaul of that Act. For instance, immigration policies are shaped indirectly by many local, state, and federal regulatory policies and by state and federal court decisions in addition to the practices of the Immigration and Naturalization Service (INS). The result is a frequently unintentional but verifiable extension of immigration enforcement responsibilities to other sectors of society. This extension is evident, for example, in enforcement of immigration laws by state and local police, in restrictions placed on the availability to noncitizens of government benefits based on need, and in the obligation of Food Stamps adjudicators to report to INS the information obtained from applicants regarding their status if legality is in doubt.[4] The labor market, however, is the immediate arena for this extension of enforcement responsibilities. There are a variety of measures, proposed or already in effect, that restrict access to certain jobs or force labor market participants into investigative and enforcement functions.

The dominant motivation behind this diffusion of investigative and enforcement functions is apparently the discouragement of immigration, both legal and illegal, by enlisting untrained official and private citizen efforts in the detection of aliens who may be present in the United States in violation of the law. This philosophy can be described as a "scorched earth" approach to controlling immigration, closing doors on immigrants and discouraging them from exercising rights while simultaneously placing enforcement responsibility to an alarming degree in the hands of a growing number of government agents and private individuals.

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[3] 8 U.S.C.A. §§ 1101-1503 (West 1970 & Supp. 1980).

[4] 7 U.S.C.A. § 2020(e) (West 1973 & Supp. 1980). In addition, persons applying for a new social security card or a replacement have been required since 1978 to submit documentary evidence of age, identity, and citizenship or lawful alien status. 20 C.F.R. §§ 422.107, 422.110 (1980); 43 Fed. Reg. 20,973, 20,975 (1978).

The term "scorched earth" is not an exaggeration, for the practices and proposals are meant explicitly to deprive those noncitizens, whose presence or activities in the United States are in fact or in perception not sanctioned by law, of the means to obtain food, shelter, clothing, education, and medical care and also to deprive them of protection from exploitation, violence, and invasion of privacy. These policies are animated by the assumptions that foreign migration to the United States is an acute crisis not unlike war and that the Constitution should permit distinctions between citizens and aliens, the latter receiving no more than minimal due process. These assumptions exist, despite the fact that the Constitution nearly always speaks in the inclusive term of "persons" rather than the exclusive term of "citizens." These assumptions are dangerous. A crisis mentality, particularly one without a firm analytical foundation, risks not only damage to the American heritage of respect for human rights and of constitutional freedoms but also a reversion to the attitudes of less civilized periods in American history such as attitudes which resulted in the Alien and Sedition Acts and the notorious Palmer raids. "Scorched earth" policies will therefore undermine trust and move the nation toward isolationism and fear.

The following five topics will illustrate the "scorched earth" approach to immigration policy and what are at best ambivalent policies toward noncitizens. The topics are labor certification of applicants for permanent residency, discrimination by private employers, the policies governing access by immigrants to state public employment and also to federal public employment, and proposals for employer sanctions for hiring illegal aliens. As will be seen, the topics are interrelated in that ambivalent attitudes and an "us versus them" mentality are necessary parts of the "scorched earth" policy.[5]

Nevertheless, it is true that there is a clear need to control migration into the United States. There are more foreigners who wish to live in the United States than can be accepted. Therefore, there must be an immigration policy to choose those whom the United States will permit to enter and live within the country.

Despite the tremendous pressures from worldwide population growth, the fears of Americans beset by inflation and unemployment should not be projected on foreigners. It is particularly important today that immigration and its control be placed in proper perspective so that it does not dominate other concerns of U.S. society. Thus, it is particularly troubling to observe the drift toward enforcement of immigration policies, but not immigration laws per se, by federal, state, and local agencies and departments other than the Immigration and Naturalization Service.

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[5] For reasons of space availability, we will only address some of the more egregious aspects of this connection between the labor market and enforcement of immigration policy. It would doubtless be of substantial interest to explore other aspects of this policy, such as the restrictions on unemployment insurance and on employment training benefits.

Beyond this impact on the profile of American society, the immigration laws of the United States represent short-run responses to global problems which must be addressed by all nations. Though the United States must reject the concept of opening its doors to all who want to enter, as that would constitute an abdication of sovereignty, it cannot wall itself off from the rest of the world. Because the pressure to migrate to the United States is considered stronger in Third and Fourth World nations, it is that pressure that U.S. policies must address. The United States must join with other nations to address the problems of population growth, a fair and equitable distribution of resources, balanced economic development, and human rights, because these forces promote international migration of persons. Otherwise, persons from lesser developed countries will increasingly seek to migrate to the United States, and this nation will increasingly use "scorched earth" policies to stem the tide. Only by addressing causes of international migration on a global scale instead of merely parochially can the vicious cycle be avoided.

II. Labor Certification of Applicants for Permanent Residence

The impact of foreign immigration upon the U.S. labor market is a major immigration policy concern.[6] Nonquota immigrants,[7] based primarily on a family relationship to a U.S. citizen, are not subject to an impact on labor test or any national, hemispheric, or global annual numerical ceiling. Other "family reunification" categories, first,[8] second,[9] fourth,[10] and fifth preferences,[11] for certain relatives of U.S. citizens and permanent residents, are subject to hemispheric and country-specific annual ceilings, but not to an impact on labor test. For the remaining immigrant visas that are numerically limited,[12] third preference for professionals, scientists, and artists,[13] and sixth preference for skilled and unskilled laborers,[14] a prerequisite for visa issuance is a Department of Labor (DOL) certification obtained by the prospective employer. The labor certification indicates a specific labor market need and that there will be no adverse effect on domestic wages and working conditions.[15]

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[6] Most immigrants receive visas under either the family reunification or refugee provisions. Refugee Act of 1980, 8 U.S.C.A. § 1157 (West Supp. 1980).

[7] Nonquota immigrants are "special immigrants" as defined in 8 U.S.C. § 1101(a)(27) (1976), and spouses and children of U.S. citizens and parents of U.S. citizens over 21, 8 U.S.C.A. § 1151(a)-(b) (West 1970 & Supp. 1980).

[8] 8 U.S.C.A. § 1153(a)(1) (West Supp. 1980).

[9] *Id.* § 1153(a)(2).

[10] *Id.* § 1153(a)(4).

[11] *Id.* § 1153(a)(5).

[12] The Immigration and Nationality Act, as amended, sets an annual worldwide ceiling of 270,000, 8 U.S.C.A. § 1151(a) (West Supp. 1980); an annual quota of 20,000 for any nation, which includes 600 for a colony, *id.* § 1152(a),(c); and establishes six preference classes with worldwide percentage distribution limits and a nonpreference class, *id.* § 1153(a).

[13] *Id.* § 1153(a)(3).

[14] *Id.* § 1153(a)(6).

Although third and sixth preference visas each have a maximum allocation of ten percent of the total number of preference visas issued, "fewer than five percent of the immigrants presently in the United States have become so by means of labor certification."[16] In 1978, only six percent of legal immigrants entered without reference to family relationships.[17] Thus, as a mechanism to protect the domestic labor force, labor certification is essentially ineffective and costly.[18] In the last fiscal year, the DOL spent over $4.7 million to administer the program.[19] In addition, much time is spent by some 8,000 state and local officials in reviewing labor certification applications and making preliminary judgments concerning the potential impact on the U.S. labor market. Processing time varies from region to region, ranging from two and one-half months in one state employment service to nine months in another.[20] After the labor certification process is completed, a third or sixth preference application will take a year to process through the INS and the appropriate consular post abroad.[21]

It is not surprising, then, that most applications for labor certification are filed on behalf of employees who are already in the United States working in the jobs they seek to have certified. The procedure thus becomes, in effect, a "selective amnesty" for certain undocumented workers. According to a DOL 1976 report, fifty-seven percent of the immigrants with labor certifications changed not only jobs but also occupations within two years of their arrival.[22] This fact tends to support the view that the labor certification procedure affords no real protection for the domestic labor market. Moreover, the long and elaborate application procedures require the active participation of employer-applicants, who are thus in a position to determine employees' legal or illegal immigration status by filing, withdrawing, or not actively pursuing employees' applications.

The present labor certification procedures should be replaced by a more rational, cost-efficient method of correlating the level of immigration entries with the needs of the U.S. labor market. The INS should maintain a periodically revised schedule of occupations for which there is an oversupply of labor in the United States. Applicants with bona fide offers of jobs which do not appear on the list would be eligible to obtain a visa under the third or sixth preferences, provided there are enough visa numbers available under those categories for their countries of origin. An applicant whose occupation is included in the schedule should be allowed to obtain an exemption from the list if the employer can show that he has been unable to fill the vacancy with qualified workers already in the United States. Exemption procedures would thus be substantially similar to the present system of certification. The proposed system would simplify admissions when their impact on labor is predetermined to be nondetrimental. At the same time it would allow for flexibility in individual cases as long as the interested parties can show that their specific cases will not violate the principle behind labor certification of avoiding detrimental impacts on the U.S. labor force due to immigration.

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[15] *Id.* § 1182(a)(14).

[16] SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, SEMIANNUAL REPORT TO CONGRESS 41 (March 1980) (testimony of Aaron Bodin, Chief, Division of Labor Certification, U.S. Dep't of Labor).

[17] Select Commission on Immigration & Refugee Policy, Working Paper, Restructuring the Preference System: Goals, Categories and Immigrant Characteristics 1 (April 17, 1980).

[18] Wildes, *The Department of Labor: Toward a Sound Approach to Labor Certification*, AMERICAN COUNCIL FOR NATIONALITIES SERVICE, 57 INTERPRETER RELEASES, July 24, 1980, at 357.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 358.

[22] *Id.* at 359.

In addition, because the present labor certification system is disproportionately weighed in favor of more highly educated immigrants, the system encourages the continuing migration of professionals from Third World nations to the United States.[23] This draining effect can be avoided by the simplified system proposal as long as the schedules of professions and occupations are carefully drawn and accurately reflect U.S. labor needs.

By a costly and inefficient mechanism, the current procedures for labor certification provide no real protection for the labor force and, more significantly, discourage aliens who are eligible for immigration benefits from applying for them because of the long delays and high costs in attorneys' fees, publications, and other procedures involved. An otherwise eligible alien also has the burden of finding an employer willing to wait for several months before hiring him and also willing to go through the bureaucratic procedures that labor certification demands. In this manner, current regulatory requirements operate as stumbling blocks for immigrants and become part of an overriding policy of using the labor market to impose unnecessary restrictions on their admission to the United States.

Thus, improvements could be had through the proposed system of maintaining an updated roster of occupational supply, noting those occupations for which jobs are scarce and which require protection from further competition. The proposed system would enable DOL's resources to be more efficiently used and would streamline this part of the immigration system. At the same time, the proposed system would promote the policy behind the present system, protection of the U.S. labor force from undue competition.

III. Private Employment Discrimination

The equal protection clause of the fourteenth amendment prohibits discriminatory treatment of aliens in state public employment opportunities. *Yick Wo v. Hopkins*[24] and *Truax v. Raich*[25] established that aliens are persons within the meaning of the fourteenth amendment and that their right to work is protected as a matter of property by the due process clauses of the fifth and fourteenth amendments. It is also long established, however, that those constitutional provisions do not reach discrimination of a purely private nature. Nevertheless, federal statutes have made it illegal to discriminate privately on the basis of race, religion, or national origin with respect to employment.

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[23] *See, e.g.*, 8 U.S.C. § 1182(j)(1)(c) (Supp. I 1977), on the return home of medical trainees.

Two major statutes proscribe such private employment discrimination. First, Title VII of the Civil Rights Act of 1964[26] forbids discrimination in hiring and promotion practices by private employers on the basis of national origin, among other reasons. In *Espinoza v. Farah Manufacturing Co.*,[27] however, the Supreme Court held that Title VII does not prohibit discrimination by employers on the basis of alienage. Espinoza was a permanent resident alien who was denied employment by Farah because of a company policy against the employment of aliens. The Court defined national origin as "the country where a person was born, or more broadly, from which his ancestors came."[28] Farah employed many citizens who, like Espinoza, were of Mexican origin; thus, Espinoza could only allege discrimination based on alienage and not nationality. Based on the legislative history of Title VII, the Court found no congressional intent to make discrimination against aliens in private employment unlawful. Consequently, it held that the term "national origin" does not embrace citizenship requirements. This holding has been uniformly interpreted by the lower courts as meaning that Title VII affords no protection to aliens against employment discrimination based on citizenship.[29]

The other federal statute dealing with discrimination is section 1981 of the Civil Rights Act of 1870, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[30]

The Supreme Court has not yet reached the question of whether section

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[24] 118 U.S. 356 (1886).

[25] 239 U.S. 33 (1915).

[26] 42 U.S.C. § 2000e-2(a) (1976).

[27] 414 U.S. 86 (1973).

[28] *Id.* at 88.

[29] Garcia v. Gloor, 609 F.2d 156, 162 (5th Cir.), *vacated*, 618 F.2d 264 (5th Cir. 1980) (forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin); Dowling v. United States, 476 F. Supp. 1018, 1022 (D. Mass. 1979); Novak v. World Bank, 20 Fair Empl. Prac. Cas. 1166, 1167 (D.D.C. 1979).

[30] 42 U.S.C. § 1981 (1976).

1981 prohibits employment discrimination on the basis of alienage, but it has explicitly applied section 1981 to purely private discrimination based on race.[31]

In the lower courts, it seems well settled that section 1981 prohibits some types of discrimination in employment.[32] The courts are widely split, however, on what bases of discrimination section 1981 prohibits. Some have said that it only protects against racial discrimination.[33] Other courts have decided explicitly that section 1981 does not apply to discrimination on the basis of national origin.[34] In at least one case, however, there is dicta to the effect that the statute reaches alienage.[35]

In *La Fore v. Emblem Tape and Label Co.*,[36] the United States District Court for the District of Colorado rejected the notion that section 1981 applies only to racial discrimination and held squarely that the statute applies to a private employer who has discriminated against a Mexican-American on the basis of his Spanish surname. The court stated that "if plaintiff can prove that an identifiable class of which he is not a member receives more favorable treatment than plaintiff because of that class distinction, then plaintiff is entitled to the protection of § 1981."[37] In two other cases on this issue in which lower courts have discussed the legislative history of section 1981, opposite holdings were reached. In *De Malherbe v. International Union of Elevator Constructors*,[38] the United States District Court for the Northern District of California held that section 1981 has neither the intent nor the effect of prohibiting private employment discrimination on the basis of alienage. In *Guerra v. Manchester Terminal Corp.*,[39] however, the United States Court of Appeals for the Fifth Circuit found, on the basis of the trial court's detailed analysis of the legislative history, that section 1981 has such an intent.[40]

If the Supreme Court settles this dispute, it will most likely put its decision in line with its holding in *Espinoza* and determine that section 1981 does not prohibit private discrimination on the basis of alienage. In the meantime, the widespread practice of restricting employment access or promotions to citizens while denying them to lawful permanent residents continues unabated. Relegating lawful permanent residents to a second-class category regarding employment opportunities not only results in an unfair treatment of permanent residents but also discourages immigration.

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[31] Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968).

[32] Young v. ITT, 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

[33] Manzanares v. Safeway Stores, 593 F.2d 968, 972 (10th Cir. 1979) (holding, however, that alleged discrimination on the basis of Spanish surnames amounts to racial discrimination for being nonwhite); *see also* Runyon v. McCrary, 427 U.S. 160, 167 (1976).

[34] Saad v. Burns, 456 F. Supp. 33, 37 (D.D.C. 1978); Budinsky v. Corning Glass Work, 425 F. Supp. 786 (W.D. Pa. 1975); Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 15 (E.D. Pa. 1975).

[35] Holton v. Crozer-Chester, 419 F. Supp. 334, 336 (E.D. Pa. 1976).

[36] 448 F. Supp. 824 (D. Colo. 1978). *See also* Manzanares v. Safeway Stores, 593 F.2d 968, 972 (10th Cir. 1979).

[37] 448 F. Supp. at 826.

[38] 438 F. Supp. 1121, 1142 (N.D. Cal. 1977).

[39] 498 F.2d 641 (5th Cir. 1974).

[40] *Id.* at 653-54. The same court later said that discrimination against Mexicans in *Guerra* had strong racial overtones. Campbell v. Gadsden County Dist. School Bd., 534 F.2d 650, 654 n.8 (5th Cir. 1976).

Therefore, attorneys have suggested that Congress rewrite section 1981 to make clear that it reaches all forms of discrimination, whether public or private, including that based on citizenship.[41] Federal legislation in this area is necessary to protect a discrete and insular minority and to establish uniformity in the field. The purpose of the proposed amendment would be to establish nationally uniform conditions of admission to and residence in the United States to be applied to all noncitizens. The new statute obviously would not prohibit discrimination on the basis of status; it is legitimate for employers to refuse to hire aliens not duly authorized to accept employment. If alienage is the sole basis for discriminatory action, however, the amendment should allow an alien to bring a claim against the employer regardless of that alien's immigration status. Therefore, section 1981 should be amended to add the following sections:[42]

> (b) "All persons" as used in paragraph (a) shall include citizens and noncitizens;[43]
>
> (c) "Contracts" as used in paragraph (a) shall include contracts for employment, whether in the public or private sector, with employers employing more than __ workers;
>
> (d) Nothing in this section shall be construed to conflict with regulations which may be promulgated regarding the employment of noncitizens in the federal civil service.[44]

Although both Title VII and section 1981 could be amended, a modification of the latter is preferable, mainly because the case law under section 1981 is unsettled and there is some judicial precedent for the proposition that section 1981 prohibits private employment discrimination based on alienage. In addition, section 1981 covers a broader range of conduct than Title VII, going beyond employment into contracting. Procedurally, section 1981 provides immediate access to federal courts without requiring a prior exhaustion of administrative remedies.[45] Section 1981 also offers plaintiffs broader remedies than Title VII in that back-pay damages are not limited to a two year period,[46] and punitive[47] and compensatory damages for humiliation, embarrassment, and mental anguish are available.[48] Finally, a section 1981 plaintiff will enjoy a longer statute of limitations than he would under the very strict terms of Title VII.[49]

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[41] Memorandum from P. Thompson to L. Low, Section 1981 of the Civil Rights Act and Discrimination by Private Employers on the Basis of Alienage, at 47 (July 28, 1980) (prepared for the Alien Rights Law Project) (copy on file at the *North Carolina Journal of International Law and Commercial Regulation*).

[42] *See* text accompanying note 30 *supra*.

[43] *But see* text accompanying notes 41-42 *infra*.

[44] Thompson Memorandum, *supra* note 41, at 54 n.1.

[45] Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

[46] 42 U.S.C. § 2000e-5(g) (1976) (two year back pay limitation for Title VII actions);

Unless these statutory changes are enacted or court interpretations of section 1981 more effectively accomplish the same result, the ability of private employers to discriminate against lawfully admitted noncitizens will continue to grow in the U.S. labor market. The effect is to create an underclass of workers whose alienage is the reason for not being hired or promoted to certain jobs. Such unrestricted discrimination against lawful resident aliens severely limits their access to significant occupational opportunities and keeps them confined to jobs with limited career development where control by employers is almost totally unrestricted. This denial of access to meaningful jobs is a pervasive aspect of the "scorched earth" approach to immigration control.

IV. State Public Employment and Licensing

Alienage is a suspect classification under the Supreme Court's interpretation of the fourteenth amendment. In the leading case of *Sugarman v. Dougall*,[50] the Court held that state action that discriminates in public employment against certain persons on the basis of their citizenship or alienage is therefore subject to strict scrutiny. Other decisions of the Supreme Court applied the same principle to state licensing practices.[51] Consequently, states are constitutionally barred from restricting public employment access of noncitizens as well as aliens to the "common occupations of the community," including the practice of professions. This line of decisions is based not only on the Court's traditional approach to fourteenth amendment equal protection guaranties, but also on Congress' plenary power over immigration policy. State restrictions on the type of occupations available to noncitizens amount to placing conditions for admitting immigrants into the United States, conditions which only Congress is constitutionally allowed to establish.

Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975) (two year back pay limitation not applicable to section 1981 actions).

[47] Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

[48] McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976); Gore v. Turner, 563 F.2d 159 (5th Cir. 1977), Plummer v. Chicago Journeyman Plumbers' Local 130, 452 F. Supp. 1127 (N.D. Ill. 1978).

[49] Under Title VII, a plaintiff must file his claim with the EEOC within 180 days of the alleged violation, or within 300 days if there has been deferral to a state or local agency. Following notice of his right to sue from the EEOC, the Title VII plaintiff must bring suit within 90 days. 42 U.S.C. § 2000e-(5)(e)-(f). Under section 1981, which does not impose its own limitation period, the plaintiff must proceed under the limit imposed by the most appropriate state statute, such as personal injury and contract claims statutes. Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975).

[50] 413 U.S. 634 (1973).

[51] Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

The most recent trend in Supreme Court cases, however, has been one of opening up exceptions to the general rule. In *Foley v. Connelie*,[52] the Supreme Court affirmed New York's policy of restricting access to employment as state troopers to U.S. citizens.[53] In *Ambach v. Norwick*,[54] the Court upheld a New York rule that restricts the hiring of public school teachers to U.S. citizens or permanent residents who declare their intention to become citizens.[55] In both cases, the Court departed from the strict scrutiny standard and applied a rational relationship test, finding in each instance that there was a rational relationship between the interest sought to be protected and the limiting classification. In this manner, the Court has retreated somewhat from its position regarding congressional plenary power over immigration policy by allowing states to set restrictions on the public employment of lawfully admitted permanent residents. The decisions also effectively open the door to future exceptions to "common occupations of the community" that have heretofore been open to noncitizens. For instance, the rationale for *Foley* is that state troopers perform functions that go to the "heart of representative government"[56] because they are cloaked with substantial discretionary power and execute broad public policy; the same rationale conceivably might be extended to private security guards. In *Ambach*, a similar decision was based on the fact that education is perhaps the most important function of state and local government;[57] that rationale conceivably might be legislatively extended to private school teachers.

Thus, although *Sugarman v. Dougall* has not been overruled, important and open-ended exceptions have been carved out. In fact, challenges to the rulings in *In re Griffiths* and *Flores de Otero* relating to professional licensing are finding their way to the Supreme Court on the basis that lawyers, for example, perform an equally important governmental function by being officers of the court.[58] *Foley* and *Ambach*, therefore, are important in that they appear to open the door for additional exceptions to the *Yick Wo* doctrine of prohibiting state public employment discrimination based on alienage.[59] The lower courts, both in state and federal cases, seem to be applying the *Foley* exception narrowly.[60]

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[52] 435 U.S. 291 (1978).

[53] *Id.* at 300.

[54] 441 U.S. 68 (1979).

[55] *Id.* at 80-81.

[56] 435 U.S. at 297-300. *See* Sugarman v. Dougall, 413 U.S. at 647.

[57] 442 U.S. at 76.

[58] State v. State Bd. of Law Examiners, 601 P.2d 174 (Wyo. 1979).

[59] Yick Wo. v. Hopkins, 118 U.S. 356 (1886).

[60] *See, e.g.*, Ramirez v. Sloss, 615 F.2d 163 (5th Cir. 1980); United States v. Tsuda Maru, 479 F. Supp. 519 (D. Alaska 1979); Andrade v. Nadel, 477 F. Supp. 1275 (S.D.N.Y. 1979); De Malherbe v. International Union of Elevator Constructors, 476 F. Supp. 649 (N.D. Cal. 1979); C.D.R. Enterprises v. Board of Educ., 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd mem. sub. nom.* Lefkowitz v. C.D.R. Enterprises, 429 U.S. 1031 (1977); Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd mem.*, 413 U.S. 902 (1973); *In re* Park, 484 P.2d 690 (Alaska 1971); Arizona State Liquor Bd. v. Ali, 27 Ariz. App. 16, 550 P.2d 663 (1976); Raffaelli v. Committee of Bar

The trend opened by *Foley* and *Ambach*, however, has already produced the effect of virtually eliminating alienage from the list of suspect classifications which require strict judicial scrutiny under fourteenth amendment analysis.

This judicial development also operates to place more burdens and restrictions on lawfully admitted noncitizens and closes doors to their pursuit of constructive vocations in the United States. It not only qualifies the equality of treatment that should be central to immigration policy, but also creates unnecessary tensions in the labor market. *Foley* type restrictions will push more aliens into private sector employment opportunities where they are most likely to compete with unskilled U.S. citizens. Such restrictions may also lower the efficiency of governmental services by forcing governments to draw their expert personnel from a reduced pool of labor supply. Most likely, they will operate to increase discriminatory effects on those ethnic minorities most easily identified with the concept of "alien" throughout the country.

Clearly, there are certain government positions that should be restricted to U.S. citizens. Elective and nonelective positions that are vital to broad decisions and execution of public policy are among them. Representative government demands that truly important governmental functions that affect the citizenry at large be restricted to those who are an integral part of that citizenry. It is important, however, that restrictions of this nature be carefully and narrowly drawn, both to avoid infringing the equal protection clause and to provide stability to this area of employment discrimination law.

The amendment to section 1981 proposed in section III of this article could accomplish this end. The proposed amendment of section 1981 would remove the post-*Sugarman* restrictions on alien employment while allowing states to restrict to their citizens those functions that go to the heart of representative government.

V. Federal Public Employment of Aliens[61]

A. *History and Current State of the Law*

General federal policy has consistently prohibited the employment of aliens in the federal service within the United States. The policy has

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Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (en banc); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) (en banc); Ruiz-Cano v. County of San Diego, 98 Cal. App. 3d 803, 159 Cal. Rptr. 602 (1979); Millett v. Hoisting Engineers' Licensing Div., 377 A.2d 229 (R.I. 1977); Nielsen v. Washington State Bar Ass'n, 90 Wash. 2d 818, 585 P.2d 1191 (1978) (en banc); Herriott v. City of Seattle, 81 Wash. 2d 48, 500 P.2d 101 (1972) (en banc); State *ex rel.* Mansfield v. State Bd. of Law Examiners, 601 P.2d 174 (Wyo. 1979).

[61] The original version of the federal employment of aliens portion of this article was prepared by co-author Charles Smith in his role of full-time legal consultant to the Select Commission on Immigration and Refugee Policy. Important guidance on that version was provided by the Commission's Deputy Director Dr. Ralph Thomas.

been initiated by an administrative agency, by presidential order, and by the Congress. First, the Civil Service Commission was created in 1883[62] to oversee and advance the merit system, and its initial rules limited competitive examination posts to citizens.[63] This policy withstood challenge until 1976, when the U.S. Supreme Court's decision of *Hampton v. Mow Sun Wong*[64] voided it for being beyond the Commission's authority. It was reinstated through executive order;[65] today, the Office of Personnel Management's Rule 7.4 carries out that policy.[66] With very narrow exceptions, only U.S. citizens are eligible to be examined for and offered competitive civil service posts. Since 1938, Congress, too, has imposed restrictions on the use of federal funds to pay the salaries of aliens in the United States. Initially a response to unemployment during the depression, the congressional ban on alien federal employment continues today, though modified by refugee- and nationality-based exceptions and by general alien employment authority given to certain departments and agencies.[67] This section will describe the traditional policy and its current methods of implementation and will then analyze the usefulness of continuing that policy in the future.

On September 2, 1976, President Gerald Ford issued an executive order[68] to reinstate the traditional policy of excluding aliens from the competitive federal service. This order was issued in response to the Supreme Court's five to four decision three months earlier in *Hampton v. Mow Sun Wong*.[69] *Mow Sun Wong* held that the Civil Service Commission's regulation limiting entry to examinations for the federal competitive service to citizens and U.S. nationals[70] was outside the scope of Commission authority and violated the due process clause of the fifth amendment. The Supreme Court in *Mow Sun Wong* did not consider the general constitutionality of the bar to lawful permanent resident alien employment in the competitive civil service. It decided only the issue of whether the Commission properly could rely upon the argued justifications for its rule. The Court found the Commission's sole concern to be "the promotion of an efficient federal service."[71] The administrative convenience of a simple exclusion policy was not shown to be necessary for efficiency so as to excuse the Commission from applying personnel expertise to alien employment.

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[62] Act of Jan. 16, 1883, ch. 27, 22 Stat. 403 (codified in scattered sections of 5 U.S.C.).

[63] *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 106-13 (1976). The author estimates that approximately 60% of all federal employees are in the competitive service.

[64] 426 U.S. 88 (1976).

[65] Exec. Order No. 11,935, 5 C.F.R. § 7.4 (1980).

[66] *Id.*

[67] 31 U.S.C. § 699b (Supp. III 1979).

[68] Exec. Order No. 11,935, 5 C.F.R. § 7.4 (1980).

[69] 426 U.S. 88 (1976).

[70] Nationals are either citizens or noncitizens who owe permanent allegiance to the United States; the principal noncitizen nationals are American Samoans.

[71] 426 U.S. at 114.

The Court held that "broadly denying this class [of lawfully admitted permanent resident aliens] substantial opportunities for employment . . . deprives its members of an aspect of liberty."[72] These aliens were admitted to residency in the United States as a result of congressional and presidential decisions. Therefore,

> due process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency.[73]

The Court explicitly assumed without deciding that the Congress or the President constitutionally might have such discriminatory power. Given this broad hint, presidential action quickly followed and thereby located the question in the arena of policy determinations.

B. Executive Order 11,935

President Ford's Executive Order 11,935, which became Office of Personnel Management Rule 7.4,[74] substantially accomplished what the stricken Commission regulation had done.[75] The Order and the Rule state:

> a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.
> b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.
> c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.[76]

The background and policy basis for the Executive Order were set forth by President Ford in a letter to Congress dated September 2, 1976.[77] The points of that letter merit highlighting. First, the President interpreted the Supreme Court's decision in *Mow Sun Wong* to mean that the Congress or the President might broadly prohibit the employment of aliens in the civil service. The Executive Order was issued by presidential authority, but urged Congress to address the issue as well. Second, the general ban on alien employment in the competitive service has a long history; President Ford concluded that its preservation was in the national interest at that time. Third, exceptions to the general ban are limited to service efficiency and the national interest and could arise in specific cases or from specific circumstances. Finally, he stated that before aliens are ever "precipitously" employed in the competitive service, there must be "an appropriate determination that it is in the national interest to do so."[78]

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[72] *Id.* at 116.

[73] *Id.*

[74] 5 C.F.R. § 7.4 (1980).

[75] Challenges to the order have not been successful to date. Plaintiff's claim under 42 U.S.C. § 1981 was rejected in Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979). Mow Sun Wong recently lost another appeal before the Ninth Circuit Court of Appeals. Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980).

[76] 5 C.F.R. § 7.4 (1980).

[77] 41 Fed. Reg. 37,303 (1979).

The President's letter thus implies that nonprecipitous opening of competitive service employment opportunity to lawful permanent resident aliens might be appropriate and in the national interest. It indicates, too, that the question is subject to rational judgment and that both the Congress and the President are appropriate policymaking institutions. The thrust of the letter is that the status quo should be maintained pending careful review and policy decision.

More than four years and one administration have passed since President Ford's letter. The need for immediate review and policy modification is supported by persuasive arguments that the Executive Order is of dubious constitutional validity.[79] Presidential authority to issue such a regulation can only be based on the President's power to appoint federal officers.[80] In *Mow Sun Wong*, the government cited *Myers v. United States*[81] as authority, but that case dealt only with the power to remove an officer without the advice and consent of the Senate and was later limited to specific causes of removal.[82] Further, statutory authority to regulate admission of individuals to the civil service[83] does not vest the President with any broad power to exclude large classes of individuals; explicit congressional authorization is necessary where "substantial restraints on employment opportunities of numerous persons"[84] are imposed. Finally, the Executive Order may violate the "due process" clause of the fifth amendment under the principle announced in *Bolling v. Sharpe*[85] because the Order does not specify the national interest on which it is based nor explain why it is beneficial for the "efficiency of the service." Courts would be bound to examine carefully those claimed interests before justifying the discriminatory treatment prescribed by the Order.[86]

C. *The Legislative Branch Prohibition*

Congress has not legislated in response to President Ford's letter. Congress has, however, voted restrictions on the federal employment of aliens for more than four decades. Section 602 of the Treasury, Postal Service and General Government Appropriations Act of 1980[87] carries forward congressional restrictions that have been included routinely in appropriations bills since 1938.[88] Under section 602 of the 1980 Act, 31 U.S.C. § 699b, no federal monies may be used to compensate any federal officer or employee whose post of duty is in the continental United States unless such person: (1) is a U.S. citizen; (2) on the date of enactment of the Act, September 29, 1979, was in the U.S. service, was eligible for citizenship, had filed a declaration of intent to become a citizen, and was residing in the United States; (3) owes allegiance to the United States (covers nationals from American Samoa and Swains Islands); (4) is a lawful permanent resident from Cuba, Poland, South Vietnam, or the Baltic countries (Estonia, Latvia, Lithuania); (5) is South Vietnamese, Cambodian, or Laotian and was paroled into the United States as a refugee between January 1, 1975 and September 29, 1979; (6) is a citizen of Israel or the Republic of the Philippines or a national of "those countries allied with the United States in the current defense effort," defined as having mutual defense treaties with the United States—Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Republic of China (Taiwan), Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, El Salvador, France, Federal Republic of Germany, Greece, Guatemala, Haiti, Honduras, Iceland, Italy, Japan, Republic of Korea, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Portugal, Thailand, Trinidad and Tobago, Turkey, United Kingdom, Uruguay, and Venezuela;[89] or (7) is being employed temporarily as a translator or for no more than sixty days "in the field service . . . as a result of emergencies."[90]

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[78] *Id.* at 37,304.

[79] J. Kramer, Federal Employment of Aliens (Aug. 1, 1980) (paper prepared at Covington and Burling for the Alien Rights Law Project) (copy on file at the *North Carolina Journal of International Law and Commercial Regulation*).

[80] U.S. CONST. art. II, § 2, cl. 2.

[81] 272 U.S. 52 (1926).

[82] Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[83] 5 U.S.C. § 3301 (1976).

[84] Greene v. McElroy, 360 U.S. 474, 506 (1959).

[85] 347 U.S. 497 (1954).

[86] Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 605 (1976).

Congress has exempted certain governmental units from the general ban on employing aliens. These include: National Aeronautics and Space Administration,[91] Department of Defense,[92] International Communications Agency (relating to skill in foreign language),[93] Foreign Agricultural Service until 1974,[94] Foreign Service Institute of the Department of State,[95] Public Health Service (consultants and fellowship recipients),[96] Library of Congress (up to 15 positions),[97] Smithsonian Institution (scientific and technical positions),[98] and the Postal Service.[99]

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[87] 31 U.S.C. § 699b (Supp. III 1979).

[88] For a list of the appropriations bills, see the annotations after 31 U.S.C. § 699b (1976 & Supp. III 1979). *See also* Act of March 28, 1938, ch. 55, § 5, 52 Stat. 148.

[89] Telephone conversation between Charles Smith and Consular Affairs counsel, Office of the Legal Advisor, Dep't of State, May 1980. Taiwan's retention on the list by the Department of State is uncertain following the Carter Administration's changes in diplomatic and treaty relationships.

[90] 31 U.S.C. § 699b (Supp. III 1979).

[91] 42 U.S.C. § 2473(b)(10) (1976).

[92] 31 U.S.C. § 700 (1976 & Supp. III 1979).

[93] 22 U.S.C. § 1474(1) (Supp. III 1979).

[94] 7 U.S.C. § 435 (expired 1974).

[95] 22 U.S.C. § 1044(e) (1976).

[96] 42 U.S.C. § 209(h) (1976).

D. *Impact of Prohibitions*

The most current data on the number and status of aliens lawfully in the United States are compiled by the Immigration and Naturalization Service through its annual alien address report program. For fiscal year 1979, INS data show 5,058,400 aliens reporting,[100] slightly more than two percent of the U.S. population, of whom approximately 4,700,000 are lawful permanent residents and refugees.[101] Of this total lawful permanent resident and refugee population, approximately 3,500,000 come under the section 699b refugee- and nationality-based exceptions to the general ban. Thus, congressional policy under section 699b permits federal employment of at least seventy-four percent of the alien population authorized to work in the country.[102]

The federal competitive service contains approximately 1.8 million jobs. Federal civilian jobs excepted from competitive examination, such as Schedules A and C and the Postal Service, comprise about one million positions.[103] For aliens to be hired for excepted positions not covered by

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[97] 2 U.S.C. § 169 (1976 & Supp. II 1978).

[98] 20 U.S.C. § 46a (1976).

[99] *See* United States Postal Service, Personnel Series Handbook P-11, § 312.2 (May 1980). The Postal Service has adopted a policy of full access by all permanent residents and refugees to all its positions at level PS-19 or below except for those designated "sensitive." *Id.*

[100] Because some aliens lawfully here do not report, the data represent an undercount of unknown magnitude.

[101] IMMIGRATION AND NATURALIZATION SERVICE, DEP'T OF JUSTICE, ANNUAL REPORT (1979). Although 31 U.S.C. § 699b (Supp. III 1979) in its general rule and exemptions speaks in terms of lawful permanent residents, refugees, and nationals of certain countries and makes no distinctions based on immigration status, the numbers drawn from INS data exclude foreign nationals who do not have permanent residence or refugee status but who nevertheless may have permission to work in the United States without violating the terms of their admission. This would include, for example, foreign students who are in the country on nonimmigrant visas. As nationals of countries designated in section 699b, such students would be technically eligible for federal service employment. Because their stay is limited to the term of their studies, they are unlikely candidates for federal employment; therefore, their numbers have not been included in the INS data.

[102] IMMIGRATION AND NATURALIZATION SERVICE, DEP'T OF JUSTICE, ANNUAL REPORT (1979). These aliens include immigrants from the following countries who have not become citizens: Mexico (1,003,470 lawful permanent residents reporting in 1979), Canada (269,643), The Philippines (217,575), Italy (176,531), South Korea (154,914), and Vietnam (89,039 plus 41,443 refugees). *Id.*

There is no reason to believe that the percentage of whatever the actual count of refugees and lawful permanent residents in the United States is would be out of line with the 74% figure. Neither the number nor the percentage are adjusted by an age profile excluding alien children or retirees who are not part of the working population. INS-reported data do not permit an age-nationality breakdown. There is no reason to believe that an age-nationality profile would change significantly the percentage of aliens permitted to be employed by the federal government, however. It is likely, though, that the proportion of working age people, from the noncitizen immigrant population is somewhat higher than the working age figures for the U.S. population as a whole because immigrants tend to be young adults.

[103] Office of Personnel Management, Central Personnel Data File: Overview Report (Feb. 1980).

Executive Order 11,935 or, under the Order, for tasks for which American citizens cannot be found (usually requiring highly technical skills),[104] section 699b requirements must be met or the jobs must be in agencies or departments having general authority to hire aliens.

As of February 1980, out of a domestic civilian federal workforce of 2,765,488, there were 5,497 alien employees, which includes temporary and short term as well as permanent employees.[105] The Veterans Administration employs 238,491 persons, of whom 2,891 are aliens.[106] Within the Army civilian workforce of 335,426, only 278 are aliens.[107] Thus, although Congress seems to have created massive exceptions to the general ban principle, the reality is less far-reaching than the law would indicate. The proportion of aliens employed by the federal government is only 0.2 percent of the total domestic civilian federal workforce, while aliens eligible to work make up about 1.5 percent of the total U.S. population.[108]

The number of alien applicants and rejections for the approximately one million noncompetitive federal service positions are unknown. Without that data, inferences of bias on the part of the government cannot be drawn even though the number of aliens hired by the federal government is small. Questions about possible bias, however, certainly are appropriate. Thus, it is appropriate to ask whether alien applications are relatively low as compared to citizen applications and, if so, whether that is due to a general belief on the part of both aliens and federal officials that alien federal employment is barred. Similarly, one can ask whether executive officials are adhering to a general pattern of discouraging and rejecting the employment of aliens.

E. A Policy Question

The current general executive policy of no federal employment of aliens derives from the principle that employment in the federal sector is a benefit or right accruing only from citizenship. The exceptions to the Executive Order are tied tightly to specific personnel needs that cannot be met by citizens or other U.S. nationals. Specific legislative exemptions for departments and agencies under section 699b, on the other hand, reveal that Congress is carving out exceptions almost to the point of turning the general ban principle on its head. Unlike department and agency exemptions that arguably arise from particular agency or expertise needs, these section 699b exceptions simply combine nationality and immigration status or arise from nationality as identified by a mutual defense treaty. Citizens from fifty-one nations, slightly less than one-third of the 163 nations of the world, are covered to varying extents by section 699b.

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[104] In practice, when executive departments or agencies hire aliens in accordance with the Executive Order exceptions, appointments are made on an excepted service basis, even though the specific position previously was listed in the competitive service.

[105] *See* note 103 *supra*.

[106] *Id.*

[107] *Id.*

[108] Figures derived from text accompanying notes 100-102 *supra*.

In terms of the present U.S. immigration profile, the Congress in section 699b denies only one out of every four lawful permanent residents and refugees possible federal employment. Thus, through exceptions Congress has effectively reversed the general rule of discrimination.

Although political and legal challenges to the federal hiring policy toward aliens may continue, legal authority today permits federal discrimination against aliens in the federal service as long as that policy is set at the proper level of government, by the Congress or the President. This permissible discrimination appears to be sanctioned in Justice Rehnquist's dissent in *Mow Sun Wong*,[109] as well as in the majority opinion, as Justice Rehnquist argued only that the Commission rule was a proper exercise of delegated authority. Though the issue was not litigated, the Justices in both the majority and the dissent did not oppose the view that the question is one of policy and not of law, the law directing only the procedures to be used to reach an exclusionary or inclusionary end. The consequence is that today there is no legal compulsion for the President or Congress to adopt one principle over the other.

As a result of the present state of the law, challenges to the Executive Order have taken the form of petitions directed to the President to change or eliminate the rule by another executive decision. Such requests have been made by public interest and community based organizations whose constituencies include large numbers of permanent residents.[110]

F. The Arguments for a General Ban and Our Opinions

The present policy and practice is not soundly based in the national interest and in fact has a negative impact on civil rights, government services, and the overall labor market. A policy of full access by permanent residents and refugees, with carefully drawn exceptions for positions with policy-making functions or whose power affects the citizenry broadly, would be much sounder.

1. Domestic and International Tradition

The present policy is based on a long-standing domestic tradition dating back nearly one hundred years. Moreover, it is in keeping with what seems to be the practice of most other nations. A United Nations survey of domestic law published in 1966 showed that only Ethiopia did not restrict public service posts to nationals.[111] This generalized practice seems to be founded on the view that national governance is a duty and a privilege flowing from the concepts of nationality and national sovereignty.

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[109] 426 U.S. at 124-25 (Rehnquist, J., dissenting).

[110] Mexican American Legal Defense and Education Fund and Covington & Burling, Memorandum on Section 602 of Public Law 95-81, at 22 (1978) (copy on file at the *North Carolina Journal of International Law and Commercial Regulation*).

The U.S. tradition, however, has become as much one of growing exceptions to a general ban as one of a general pattern of not hiring aliens. Despite international tradition, the United States is above all a unique country. More than any other country in the world, the United States is a "nation of immigrants." Recognizing this fact, the Supreme Court urged in *Mow Sun Wong* that the nation should not root its attitudes toward immigrants in the nineteenth century:

> Moreover, it must be acknowledged that in 1883 there was no doubt a greater inclination than we can now accept to regard "foreigners" as a somewhat less desirable class of persons than American citizens. A provincial attitude toward aliens . . . has been implicitly repudiated by our cases requiring that aliens be treated with the dignity and respect accorded to other persons.[112]

Furthermore, the United States might be better served by establishing its principles toward immigrant non-nationals without regard to the practices of other nations. As in the encompassing area of human rights, the United States should set standards for other nations to emulate.

2. *National Security and Allegiance*

A second argument for retaining a general ban is the presumption that persons who have a national loyalty elsewhere cannot maintain a loyalty to the United States. Admittedly, it is difficult to make a qualitative presumption about a subjective attribute for which nationality is but one factor. The above presumption is nevertheless subject to criticism.

Lawful permanent residents have only one domicile, the United States. They serve in the Armed Forces and are subject to conscription;[113] they pay taxes; and, as the Supreme Court reiterated in *Mow Sun Wong*, "it is settled that aliens may take an appropriate oath of allegiance."[114] Furthermore, the Postal Service has been able to identify by level and sensitivity those positions that require special inquiry for a lawful permanent resident to be hired. Aliens are also employed in sensitive agencies such as NASA and ICA. Practice, then, shows that alienage is not a firm barrier to security clearance, loyalty, or allegiance.

3. *An Incentive to Naturalize*

A third argument made is that citizenship is the ultimate goal in the admission of permanent residents and there must be incentives to induce permanent residents to adopt U.S. citizenship. Access to federal employment is thus presented as a feature that makes naturalization an attractive proposition for lawful permanent residents. While immigration itself may properly have economic motives, the United States may want citizenship to be sought and cherished for its intrinsic value. If this is the U.S. goal, it can best be accomplished by ensuring that an immigrant's citizenship interests are unselfish. It is possible, too, that an alien employed by the federal government would be more likely to naturalize as a gesture of loyalty. The complexity and delicacy of the highly personal decision to naturalize should not be disturbed. Holding out federal employment as an incentive to naturalize may skew a decision that ought to be reached on grounds pertaining to U.S. values and history without regard to job prospects.

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[111] United Nations Department of Economic and Social Affairs, Handbook of Civil Service Laws and Practices, at 329, U.N. Doc. ST/TAO/M 29 (1966).

[112] 426 U.S. at 107.

[113] 50 U.S.C. app. §§ 453, 454(a) (1976).

[114] 426 U.S. at 109.

4. Employment Competition

A fourth argument for the present system is that it preserves a number of jobs for American citizens in an era of persistent unemployment. The problems of the depression, which led Congress to enact section 699b, remain present today albeit in a less critical form. A supporting argument is that recent additions to the labor force in the form of immigrants should more appropriately go to the private sector because it is there and not in the government where growth takes place and to which recent additions should contribute.

It may be erroneous, however, to view the labor market as having two distinct parts, government and nongovernment. One can posit that economic analysis would show that excluding lawful permanent residents and refugees from federal employment has an exaggerated impact on job opportunities and wage levels in selected sectors of the labor market, especially entry levels that promise upward mobility in service and manufacturing industries. If this theory be true, it could harm citizens in locales where noncitizen immigrants cluster, such as urban centers that contain large populations of minority youth and other disadvantaged workers seeking private employment. Federal employment also may be concentrated in urban centers; opening federal employment opportunities to aliens may reduce competition for private employment. Finally, a federal exclusionary policy toward aliens may contribute both to citizen insensitivity to immigrants and to increased conflict, fostered by the appearance of federal approval of second-class status for immigrants and by private sector competition. The federal government's obligation to citizens is paramount, but it is open to question whether giving preference to citizens over aliens in federal employment meets that obligation.

5. Federal-State Consistency

It is equally open to question whether the federal policy of exclusion is valid when a similar state policy would be clearly unconstitutional. As discussed in section IV of this article, the current state of the law on access by immigrants to state public employment is quite different from that at the federal level. States may not discriminate between aliens and citizens in their employment and licensing laws unless they show a "compelling government interest" in drawing distinctions against aliens, who are within a "suspect classification."[115] In 1978 and 1979, the Supreme Court found citizenship to be a proper qualification for state troopers[116] and for teachers.[117] In both cases, the Supreme Court found a sufficient state interest because the jobs involved governmental functions calling for the "formulation, execution or review of broad public policy"[118] and going to "the heart of representative government."[119]

State cases in this area are based on the fourteenth amendment, and because of Congress' plenary power over immigration and the President's discretionary authority in implementing congressional decisions, it is clear that similar arguments do not apply to the federal government from a constitutional point of view. It is anomalous, however, for the federal judiciary to place more stringent standards upon the states in the area of public employment than it does upon the federal government itself. The legal conclusion that, because of plenary powers, the federal government may discriminate more broadly against aliens than may state governments, does not direct a policy conclusion that such discrimination is proper. If it is appropriate for states to meet equal protection standards in applying citizenship requirements to their employees, it should be no less so for the federal government.

Three principles appear to be set forth by the Supreme Court in its state employment discrimination cases: (1) "common occupations of the community" cannot be denied to residents, regardless of citizenship; (2) sweeping limitations by states on alien employment are impermissible; and (3) states may identify citizenship as relevant to particular jobs that pertain to governmental functions affecting the broad conduct of the citizenry, such as law enforcement and education. The federal government should set the same standards for itself.

6. *Treaty Negotiation*

The government's brief in *Mow Sun Wong* stated that one more reason to continue the policy of a general ban is that holding out special benefits to foreign nationals may be useful in negotiating international treaties.[120] From the list of section 699b exceptions, though, it is not evident that federal employment has been a useful bargaining chip. In France, for instance, U.S. citizens are not given reciprocal access to foreign positions. Section 699b exceptions also reveal federal employment eligibility for persons from the communist countries of Cuba and Poland and refugees from Southeast Asia. On the other hand, persons from some friendly countries without mutual defense treaties with the United States, including Sweden, Ireland, Switzerland, and Egypt,[121] do not have such preference. Further, nationality does not play a direct role in the Executive Order exceptions, nor is it pertinent to the departments and agencies that Congress permits to hire aliens. The American Civil Liberties Union, in its brief on behalf of *Mow Sun Wong*, stated the essence of the difficulty with the bargaining chip argument: "The notion that resident aliens may be used as 'bargaining chips' to obtain benefits for American citizens residing abroad truly 'shocks the conscience' and violates the first principles of due process of law."[122]

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[115] *See In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

[116] Foley v. Connelie, 435 U.S. 291 (1978).

[117] Ambach v. Norwick, 441 U.S. 68 (1979).

[118] 441 U.S. at 74; 435 U.S. at 296 (both cases quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

[119] 441 U.S. at 74 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

[120] Petitioner's Brief for Certiorari at 61, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

G. *Further Arguments Against a General Ban*

Finally, two other reasons militate against the maintenance of the status quo. First, the narrow and limited exceptions to the general ban have resulted in a cumbersome procedure to establish when conditions have been met for hiring noncitizens. Determinations that citizens are not available to fill certain positions involve costly administrative proceedings and in many cases simply are not made. The result is harmful to the efficiency of agencies in certain areas, particularly where needs and shortages of personnel are difficult to predict and congressional or presidential policies lack flexibility.

Second, in areas where permanent residents tend to be of one single national origin, such as the Mexicans in the Southwest, the present policy only aggravates an existing pattern of employment discrimination based on race and national origin.

H. *Conclusion*

The only sure function of the current policy and practice is the discouragement of immigration by closing employment opportunities to permanent residents and refugees. The practice is thus another instance of using the labor market as a means to implement a nonexplicit immigration policy. It also represents an unfortunate aspect of a diffuse policy toward immigrants which maintains them in an inferior or second-class status. This policy is especially unacceptable when no valid national interest is served and when, in fact, there are clear indications that it creates negative side effects in the field of civil rights and economic opportunity for all members of the community.

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[121] *See* note 89 *supra*.

[122] Amicus Curiae Brief at 18 n.3, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (American Civil Liberties Union).

A more sensible and simple approach would be a policy of full access to federal positions for immigrants, refugees, and other aliens duly authorized to work, with exceptions carved out for functions where citizenship is undoubtedly relevant—such as representing the United States before foreign governments—or whose power affects the citizenry directly and broadly, such as a judge or any high federal policy-maker.

Congress, therefore, should enact comprehensive legislation in this area, an action that is clearly within its powers. Such legislation should secure the general principle of access, with exceptions for fundamental government functions and national security-sensitive positions. The agencies then should be directed to issue guidelines to determine when such exceptions apply[123] and to establish recruitment and hiring standards reflecting the general access principle.

The general principle of access fits within U.S. traditions of openness and freedom, enhances competition and thus efficiency, and is one hallmark of an open as opposed to a closed society. It, of course, admits exceptions where necessary and justifiable. The opposite principle, closing job opportunities, is the present policy and is part of an emerging "scorched earth" attitude toward aliens, including lawful immigrants. When the federal government sets such standards and legitimizes such attitudes by doing so, it acts as a beacon for similar actions by other levels of government and by private enterprise. "Scorched earth," in this way, becomes not the exception but the rule.

VI. Employer Sanctions

Employer sanctions are laws that penalize the hiring of a person not legally permitted to work. For example, when the Fair Labor Standards Act prohibits oppressive child labor,[124] it imposes employer sanctions through the rationale that government should protect those who need protection and cannot protect themselves.[125] Except for the Farm Labor Contractor Registration Act of 1963,[126] federal law today does not regulate private employer hiring of persons by immigration or citizenship status.[127] Federal law, generally, does not require a private employer to determine affirmatively that a job applicant or employee is a citizen or a noncitizen legally in the United States, holding individual INS permission or a visa authorizing such employment.[128]

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[123] Kramer, *supra* note 79, at 36.

[124] 29 U.S.C. § 212 (1976). Penalties include criminal prosecution, *id.* § 216(a), and injunctive relief, *id.* § 217, for both employment and the transportation and sale of goods in which oppressive child labor is used.

[125] Other rationales for government interference in the market economy include ensuring decent wages and working conditions, protecting group action, preventing monopolistic practices, promoting equal access, and remedying past injury. The gamut of traditional policy reasons should be kept in mind when thinking about employer sanctions.

[126] 7 U.S.C. § 2045(f) (1976) (indirect regulation of alien by regulation of migrant worker employer who violates the Act if he employs an illegal alien and is subject to civil and criminal sanctions for such violation).

[127] Twelve states have employer sanction laws. Cal. Lab. Code § 2805 (West Supp. 1980); Conn. Gen. Stat. Ann. § 31-51k (West Supp. 1980); Del. Code Ann. tit. 19, § 705 (1979); Fla. Stat. Ann. § 448.09 (Supp. 1979); Kan. Stat. Ann. § 21-4409 (1974); Me. Rev. Stat. Ann. tit. 26, § 871 (West Supp. 1980); Mass. Ann. Laws ch. 149, § 19C (Michie Supp. 1981);

Through the "harboring" exception to section 274 called the "Texas proviso," the INA makes this explicit:

> Any person . . . who . . . (3) wilfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor or shield from detection, in any place, including any building or any means of transportation . . . any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or of any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.[129]

The felony of harboring an illegal alien, with its "Texas proviso," illuminates but does not dispose of the employer sanctions issue in the immigration debate.

If the "Texas proviso" were repealed and "harboring" be deemed to include employment, the law would contain a stringent and comprehensive employer sanction, the possibility of felony penalties against employers who hire aliens whose presence in the United States is illegal. The present asymmetry of deporting the undocumented alien worker without penalizing the employer would be removed. To some, the harshness of alien deportation would thereby find its equal in felony consequences to the employer.

Employer sanctions accomplished by removing the employers' harboring exception in the INA, however, are not only unlikely as a political matter, but also prosecutorially unpromising. The offense does not warrant such severe punishment and the high scienter standard, "wilfully or knowingly," makes conviction unlikely, if only because of the technical

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MONT. CODE ANN. tit. 39, § 2-305 (1979); N.H. REV. STAT. ANN. ch. 275-A, § 4-a (Supp. 1979); N.J. STAT. ANN. 34:9-1 (West 1965); VT. STAT. ANN. tit. 21, § 444a (1978); VA. CODE § 40.1-11.1 (Supp. 1980).

Though state authority to enact such laws has been upheld as legitimate state labor market protective action not preempted by federal plenary power over immigration, De Canas v. Bica, 424 U.S. 351 (1976), enforcement is dormant. This is partly because the offense is viewed as insignificant in the range of prosecutorial priorities and partly because proof of intent, ("knowing" employment of an undocumented alien is the usual standard which can be met by a showing of "pattern and practice"), is very difficult as few employers are expert pathfinders in the labyrinth of the INA.

[128] An employer who refuses to hire a noncitizen, regardless of the alien's immigration status, does not risk liability under Title VII of the Civil Rights Act of 1964 so long as his discrimination ground is alienage and not "national origin." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).

[129] 8 U.S.C. § 1324(a)(3) (1976).

nature of an alien's due admission into or lawful entitlement to "enter or reside" in the United States. The practical barriers to enforcing not only the harboring provisions of section 274 but also the concealing and shielding provisions, for which direct eyewitness evidence seems necessary, give the "Texas proviso" the appearance of surplus legislative language. Yet, though removal of the proviso likely would not change the effect of the present law, it is the implication of the "Texas proviso" that is particularly troubling; employers may use cheap, exploitable labor without serious risk.

There are energetic advocates of employer sanctions as the ultimate solution to the illegal alien problem,[130] viewing it less as a method to prevent alien abuse than as a way to control illegal immigration and to protect against impacts on the labor market. During the past decade, employer sanctions legislation has been actively pursued by Congress with support from the Nixon, Ford, and Carter administrations. The major proposals are synopsized in Table 1.

The argument put forth by employer sanction advocates is rarely cluttered by complex questions of assumptions, means, or ends. For instance, in 1975, the House Judiciary Committee reported:

> The committee believes that the primary reason for the illegal alien problem is the economic imbalance between the United States and the countries from which the aliens come, coupled with the chance of employment in the United States. Consequently, it is apparent that this problem cannot be solved as long as jobs can be obtained by those who enter legally as non-immigrants for the sole purpose of obtaining employment.
>
> The Committee, therefore, is of the opinion that the most reasonable approach to this problem is to make unlawful the "knowing" employment of illegal aliens, thereby removing the economic incentive which draws aliens to the United States as well as the incentive for employers to exploit this source of labor.[131]

The simplicity of the statement in part accounts for its attractiveness. Despite the impressionistic nature and the attendant dangers of misusing the data on undocumented alien presence in the United States, studies "generally agree that there is a significant undocumented worker population in the United States . . . . The unresolved question is what degree of economic impact undocumented workers have on American

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[130] Among these advocates are the Federation for American Immigration Reform which successfully lobbied Senator Walter Huddleston to introduce an employer sanctions amendment to the 1980 INS "efficiency package." The package and the amendment never reached a floor vote. David North, a researcher-activist from the New TransCentury Foundation in Washington, D.C., has been a principal advisor on employer sanctions to the Select Commission on Immigration and Refugee Policy. The *Washington Post* columnist William Raspberry has written favorably about employer sanctions from a position of special concern over minority unemployment. Raspberry, *Another Side to "Hiring American*," Wash. Post, Sept. 15, 1980, § A, at 21, col. 2; *Hiring American*, Wash. Post, Sept. 8, 1980, § A, at 21, col. 6; *Should It Be Legal to Hire Illegals?*, Wash Post, Aug. 8, 1980, § A, at 13, col. 1.

[131] H.R. REP. NO. 506, 94th Cong., 1st Sess. 6 (1975).

Table 1

Employment Eligibility and Employer Responsibility Bills

	H.R. 16188 Rodino Bill (1972)	H.R. 8713 Rodino Bill (1975)	S. 561 Kennedy Bill (1975)	S. 3074 Eastland Bill (1976)	S. 2252 Carter Package (1977)
Explicit language prohibiting "knowing" employment of unauthorized aliens	x	x	-	x	-
Employer defense based on a bona fide inquiry re employment eligibility	x	-	x	x	x
Sanctions for hiring limited to civil penalties	-	-	x	x	-
Sanctions for hiring including criminal penalties	x	x	-	-	-
Initial civil penalty followed by combination with injunctive remedy for "pattern or practice" of employing illegal aliens	-	-	-	-	x
Attorney General authority to seek injunctive remedy	-	x	-	x	x
Felony to assist "knowingly and for gain" an undocumented alien in obtaining employment	-	-	-	-	x
Adjustment to permanent resident status for some illegal aliens	-	x	x	-	x
Adjustment to new temporary residence status for some undocumented aliens	-	-	-	-	x
Provision to assure labor supply to employers	-	-	-	x	-
Attorney General authority to initiate actions for national origin discrimination	-	x	-	-	-
Extension of Civil Rights Act employment discrimination protection to aliens authorized to work	-	-	x	-	-
Explicit preemption clause	-	-	-	-	x

Select Commission on Immigration and Refugee Policy, Working Paper, Inhibiting Illegal Migration: Employment Eligibility and Employer Responsibility app. 16 (March 27, 1980).

workers."[132] On the one side are employer sanction proponents, among whom an influential voice is David S. North, an economist specializing in migration issues at the Trascentury Corporation, Washington, D.C. In testimony on February 25, 1980 in Denver, before the Select Commission on Immigration and Refugee Policy, he asked:

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[132] U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 57 (1980).

> Why an employer sanctions program? It is clear that . . . most illegal migrants come to the U.S. to work, and one may assume, quite safely, that there are millions of them in the U.S. labor market. An employer sanctions program would discourage such employment, open up a number of jobs (not one-for-one, of course) for U.S. residents, and serve as a healthy tonic to the U.S. labor market . . . .

Elsewhere, North has written:

> A number of benefits, both direct ones and indirect ones, would flow out of an effective employer sanctions program.
>
> The most obvious direct benefit would be the opening of a number of jobs now held by undocumented workers ineligible for amnesty (or likely to be filled by such workers in the future), most of which would be filled by legal U.S. workers, thus decreasing U.S. unemployment.
>
> . . . .
>
> The movement of, say, one million undocumented workers out of such jobs would have a healthy effect on the secondary labor market, lifting wages and perhaps improving working conditions for the largely disadvantaged resident workers holding secondary labor market jobs (Blacks, Chicanos, Puerto Ricans, women, teenagers, the aging, and the handicapped). The lowered unemployment rate, in turn, would ease the pressure on the hard-pressed unemployment compensation trust funds, as well as reducing the numbers of persons on food stamps, and perhaps removing some from the AFDC [Aid to Families with Dependent Children] rolls.[133]

On the other side are employer sanctions skeptics and opponents who challenge the assumptions. Attorneys at Georgetown University Law Center's Institute for Public Representation write:

> To conclude that employer sanctions would significantly ameliorate these problems [*e.g.*, displacement or disadvantaging of American workers, especially in light of high national unemployment rates; employer exploitation of undocumented alien workers for economic advantage; a marginal job sector outside the attractive mainstream economy; and overuse of entitlement assistance programs] requires that one make two essential assumptions. The first is that the marginal (sometimes called "secondary") economy is what it is because it employs vulnerable undocumented workers. The other is that the inhibition of the "pull" factor of job opportunity will have a significant effect upon migration patterns which by common agreement are the result of complex "push-pull" phenomenon, including conditions in the source countries, physical proximity, ease of access (particularly through the services of alien-smugglers or "coyotes") and cultural and family ties.
>
> We do not argue that these assumptions are categorically wrong. We do believe, however, that there is sufficient doubt about their validity to suggest caution in proposing ways to deal with the problem of unauthorized immigration . . . .

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[133] D. North, Keeping Undocumented Workers Out of the Workforce: Evaluation of Alternative Strategies, at 3-4 (May 1978) (Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C.).

> . . . .
>
> We note also that job opportunity is but one of the many factors which contribute to the flow of migrants, authorized or not, to the U.S.A. If employer sanctions are effective in inhibiting particular job opportunities, they may nevertheless only marginally inhibit the migrant flow itself. This outcome would threaten to create a large undocumented population, lacking economic self-sufficiency, which would either impose other social costs, on public order or medical services for instance, or would increase the labor force available to an underground economy.[134]

This focus on assumptions is especially important, for the assumptions define the problems which employer sanctions are the proposed means to eliminate. The principal problem that undocumented alien workers are said to cause is American unemployment. Because this premise has not been proven, there is more than an incidental element of scapegoating when such authorities as former Secretary of Labor Ray Marshall claim that excising undocumented workers from the labor force would bring unemployment below the four percent level.[135] Others have asserted the contrary, that the United States "should not attribute to international migration an exaggerated effect on U.S. employment. The unemployment rates in the United States are not primarily the result of illegal migration."[136] There is therefore much controversy over whether any of the benefits of employer sanctions that are assumed by its advocates would really occur.

A superficial advantage of employer sanctions to those whose principal concern is the domestic scene is that it assumes complex motivational "push" factors to be essentially irrelevant. The mere assertion that there is employment opportunity in the United States says nothing about why a Mexican may be more likely than a Canadian to migrate illegally. Nor does it address myriad other aspects, ranging from the political and religious freedoms Americans enjoy, to the backlog effect of annual national quotas and the racial bias in the INA due to historic exclusions and colonial limitations which today leave areas of the world with little or no access to family reunification.[137] Any palliative that responds to a partial diagnosis of a complex situation will inevitably be no more than symbolic and thus basically inadequate.

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[134] E. Glitzenstein, A. Pandya, and D. Parker, Discriminatory Effects of Employer Sanctions Programs Under Consideration By the Select Commission on Immigration and Refugee Policy, at 56-57 (November 1980) (prepared for the Alien Rights Law Project) (copy on file at the Institute for Public Representation, Georgetown University Law Center).

[135] *See* R. Waldinger, The Case Against Employer's Sanctions (May 1980) (Joint Center for Urban Studies of MIT and Harvard University) (copy on file at the *North Carolina Journal of International Law and Commercial Regulation*). For Secretary Marshall's statement, *see* N.Y. Times, Dec. 3, 1979, § A, at 22, col. 2. For elaboration of his views, *see* Marshall, *Economic Factors Influencing the International Migration of Workers*, in VIEWS ACROSS THE BORDER: THE UNITED STATES AND MEXICO (S. Ross ed. 1980).

[136] C. Keely, U.S. Immigration: A Policy Analysis, at 59 (1979) (a Public Issues paper of The Population Council, New York). This viewpoint, however, internationalizes and raises what may be a more fundamental if less politically resonant concern, population growth and stabilization. *See, e.g.*, L. Bouvier, The Impact of Immigration on U.S. Population Size, at 1-3 (January 1981) (Population Reference Bureau, Inc., Washington, D.C.). As a method of stabilizing population growth, too, employer sanctions have attracted some commentators. *See generally* Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, FOREIGN AFFAIRS, Fall 1980, at 21.

Furthermore, inherent in the assumptions about cause and effect are untested assumptions about deterrence. Employer sanctions is a significant proposal that has been in the public eye for at least a decade, yet the literature on it remains relatively small and unsophisticated in light of the extensively applied experiences of social scientists, psychologists, and planners working in law enforcement.[138] A review of all the employer sanctions literature reveals no significant use of the extensive theoretical and case study work on deterrence done by criminal justice researchers.[139] At the very least, proponents of employer sanctions should feel a scholarly obligation to examine the utility of deterrence knowledge as developed in the criminal justice area in relation to their deterrence claims for employer sanctions as they affect both undocumented immigrants and U.S. employers. The fact that employer sanctions advocates have not faced this responsibility leads one to ask whether the omissions are purposeful or negligent; neither justification is acceptable.[140]

Hand in hand with a deterrence theory is a second question law enforcement planners must ask: what incidence of illegality is acceptable? This question is posed to determine resource needs and allocations. It presumes that "[s]ome law is always or almost always enforced, some is never or almost never enforced, and some is sometimes enforced and sometimes not."[141] Yet this question, too, is barely touched upon by employer sanctions advocates. David North, for example, refers only to comparative "degrees of effectiveness"[142] of four types of employer sanctions legislation. If there are between 3.5 and 5 million unlawful residents in the United States,[143] it is necessary to ask what number or, since the numbers are so speculative, what fractional reductions in the presence and flow of illegal immigrants would be acceptable. Naturally this inquiry raises further problems such as distribution and local impact. Yet these are precisely the types of questions that must be posed, with full acknowledgement of the operative assumptions, before Congress designs a series of responsive law enforcement options with attendant costs. Acceptability is not simply a statement of what is wished. Rather, it is a rational calculation that takes into account a host of surrounding factors such as human and civil rights, foreign policy consequences, and verifiable impacts on the U.S. economy and unemployment.[144]

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[137] *See generally* Waller, *Unequal Protection: Public Benefits, Public Policy, and Aliens*, this issue.

[138] Insights from anthropology and mental health, too, are poignantly neglected by employer sanctions advocates, perhaps because they ineluctably would be forced to deal with "pull" factors other than paychecks and the host of "push" factors that they simply ignore.

[139] The Law Enforcement Assistance Administration has supported a wide range of scholarship and experimental programs since its founding in 1968. Its National Institute of Justice publishes an annual bibliography. The subject index of a recent bibliography identifies 27 of the 656 entries as specifically about deterrence. NATIONAL INSTITUTE OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, SNI DOCUMENTS 1979: A COMPREHENSIVE BIBLIOGRAPHY (June 1980).

[140] Although we are critical about leaps to policy recommendations—in particular those supporting employer sanctions—that we believe will make major changes in the relationships among people in the United States, we join David North in warning of the pitfalls in this relatively uncharted area. He writes:

> The reader should be warned that despite widespread interest in illegal migration and bursts of ethnographic studies regarding the migrants themselves (an undeniably appealing group of subjects), there has been virtually no work done by scholars on alternative approaches to the enforcement of the immigration and related laws. This report, then, is an exploration of a new field, written under deadline pressures, and subject to the inherent disadvantages of those conditions.

D. North and J. Wagner, Enforcing The Immigration Law: A Review of the Options, at ix (Draft, June 1980) (Center for Labor and Migration Studies, New TransCentury Foundation Washington, D.C.) (prepared for the Select Commission on Immigration and Refugee Policy).

[141] K. DAVIS, POLICE DISCRETION 1 (1975).

[142] D. North, *supra* note 133, at 3. *See* Table 2 *infra*.

Another alluring argument for employer sanctions is that experience shows that the workplace is an efficient place to focus interior immigration law enforcement and that having employers screen workers for legality maintains this workplace locale and multiplies enforcement capacity at minimal public cost. Much INS interior enforcement has concentrated on places of employment because it is not unusual for a given employer to have more than one undocumented alien on his rolls. In addition, fourth amendment issues appear to be less complex and volatile when, for instance, a factory rather than an apartment, picnic, or street gathering is raided without the owner's objection, with questioning being based upon informant or observational information.[145] Finally, because working without authorization is one of the common deportable offenses for nonimmigrant visitors,[146] a workplace seizure provides direct evidence, which would not be available from a street arrest, of that out-of-status activity for aliens who were admitted with inspection.[147]

The notion, however, of enlisting employers in the fight against illegal aliens as a means of enforcing the law ignores fundamental aspects of American society. While there are myriad health, safety, and employment standards that employers must adhere to, the government requires all employers to actively participate in enforcement of the law with respect to their employees in only one area, taxation. Employer sanctions would thus become only the second such general requirement. This obviously would be a major change in the relationship between government and the people. The other obvious change caused by employer sanctions would be that private persons will be asked to discriminate according to a legal category, such as citizen or unlawful entrant. To date, the federal government has been chary of establishing such intrusive labeling that would erect barriers to labor market access. To the contrary, federal intervention in the labor market has generally followed the view that the government has an obligation to protect access and ensure fairness, particularly when employment is at stake.[148] Justice Douglas stated: "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property."[149]

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[143] Department of Commerce, Bureau of the Census, Working Document, Review of Existing Studies of the Number of Illegal Residents in the United States, at 19 (January 1980) (prepared for the Select Commission on Immigration and Refugee Policy). This estimate is not an official estimate of the Census Bureau. The report states, "This review of the existing studies on illegal residents in the United States finds that there are currently no reliable estimates of the number of illegal residents in the country or of the net volume of illegal immigration to the United States in any recent past period." *Id.* at 18.

[144] Claims for employer sanctions, such as David North's hypothesis that a million jobs will open to American workers or Labor Secretary Ray Marshall's claim that removal of undocumented workers would drop the unemployment rate below four percent, require greater analytical support to be persuasive. *See* notes 133 & 135 *supra*.

[145] *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980).

[146] 8 U.S.C. § 1251(a)(9) (1976); *see* Pinella v. Board of Review, 155 N.J. Super. 307, 382 A.2d 924 (App. Div. 1978).

[147] Aliens who enter without inspection are deportable for that act, 8 U.S.C. § 1251(a)(2) (1976), and the burden is on the alien to show "time, place and manner of entry," *id.* § 1361.

Employer sanctions inevitably would lodge government between the individual and most employment in a fashion much different from regulation according to civil rights standards which ensures the free play of skill, opportunity, and fair market forces; employer sanctions are unrelated to a person's actual or potential economic contribution. The most dramatic conclusion one reaches about employer sanctions is that they are appropriate to nations with centrally-controlled economies. Economically, they are a national socialist measure; politically, they are totalitarian.

To illustrate what an extraordinary proposal employer sanctions are, consider parallel sanctions which could be imposed on other entities also in regular contact with a wide variety of people. Landlord sanctions, for example, would punish any landlord who rented housing to an undocumented alien. The conservative rationale would be that undocumented aliens squeeze tight rental markets, particularly in cities where they cluster, reducing the opportunity for citizens and other lawful residents to find good housing and resulting in higher rental fees. The liberal rationale would be that rapacious landlords are exploiting undocumented aliens by threatening to report them to the INS unless they pay inflated prices, live in overcrowded conditions, and do not report health and safety violations. Finally, the enforcement efficiency argument would be that, because everyone needs a place to live, shutting off the possibility of shelter would deter most aliens who wish to come to the United States without inspection or who plan to violate nonimmigrant visa terms. The same arguments could be raised for many other entities sharing broad public contact: dentist sanctions, grocer sanctions, mechanic sanctions, and teacher sanctions.[150] The police state consequences of such "scorched earth" proposals are clear.

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[148] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 427-55, 948-53 (1978).

[149] Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

Aside from tenuous assumptions and the danger of unthinkingly accepting colorable proposals, employer sanctions present the fundamental question of how one identifies oneself. The key to employer sanctions is creating a barrier to U.S. jobs that can be overcome only by those persons permitted to work. Though the barrier will be manned by employers, it must be constructed by the federal government in order to be uniform nationwide. The federal government therefore would have to provide an identity system that would enable employers to screen people in or out of the labor market without error or discrimination.

This task is as complex as the United States itself. The United States is a heterogeneous society and there are no obvious ways to distinguish a citizen from an immigrant or a nonimmigrant from an undocumented alien. No certainty about a person's nationality or immigration status can be had from the physical appearance, dress, age, accent, English language skill, companions, or demeanor. Also, for the most part, the INA does not govern a person's ordinary behavior. Most violations, including working without INS or visa authority, are status offenses. They turn on a person's legal status derived from the label of being "alien." An individual whose nonimmigrant visa has expired is no different personally the day after it expired than he was the day before.

In addition, most INA violations are victimless. An alien who enters illegally or who enters legally but works without authorization does not harm anyone directly or suffer harm himself, except to the extent that he is exploited within legal definition, suffers peonage, or feels anxiety that his employer will report him to the INS and retain his backwages. It is possible, of course, that society in general or aggregate groups of workers may be harmed, though as noted earlier this harm is highly speculative and rarely can be demonstrated as specific injury to a lawful worker or job seeker. Because labor is legal, an undocumented alien who works alongside a citizen commits through his labor no more of a labor offense, as contrasted to an immigration offense, than does the citizen.

Consider the example of employer sanctions being applied to identical twins working side by side, one a U.S. citizen and the other an undocumented alien. Nothing in appearance or activity distinguishes one from the other; yet, one is deportable and, under employer sanctions, his employment could lead to punishing the employer. Therefore, to implement employer sanctions the government must develop a mechanism to separate and distinguish the legal from the illegal worker. Without such a mechanism, an employer inevitably will discriminate against citizens or immigrants whom he believes to be illegal or alternatively will hire undocumented aliens who appear to be citizens. Without help, the employer's decisions thus will be either overinclusive or underinclusive as he walks the line between employer sanctions and civil rights concerns.

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[150] The Texas "school cases," Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978), have scorched earth sanctions rationales attached to the government's arguments.

Because the essence of a fair system is simple, unbiased identification, the government must face the task of inventing an identity system in order for employer sanctions to work. For an employer to be punished fairly for hiring someone illegally, he must commit an act he could have avoided without breaching other laws that ensure fair hiring practices. If an employer is held to a knowledge standard he must have means to obtain that knowledge at minimal cost to his operations, including his relationships with employees, applicants, and the community at large. To avoid legitimizing employer discrimination against people who appear foreign, employer sanctions need either a strict knowledge standard or a supportive identity mechanism that simultaneously prevents employers from engaging in and employees from experiencing illegal discrimination. If employers themselves are required, with penalties for refusal, to enforce the law privately by rejecting applicants who are not permitted to work, the federal government may need to establish an objective, fraud-proof identity system. To permit an employer to reject an applicant on suspicion rather than certainty of illegal presence would not only cause serious and legitimate social outcry, but would also subject the employer to discrimination lawsuits.

Because the basic immigration interior enforcement questions are identity and status, advocates of employer sanctions have devised a continuum of methods for identification.[151] The identity continuum moves from the most effective to the most porous. The identity systems proposed include a national work identity card, a centralized data bank, a simple affidavit, and a multiplicity of identifiers. The most curious aspect of these methods is that the more effective they are, the more dangerous they become to the U.S. tradition of civil rights. Justice William O. Douglas has observed:

> Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interest of security. That is why riding boxcars carries extreme penalties in Communist lands. That is why the ticketing of people and the use of identification papers are routine matters under totalitarian regimes, yet abhorrent in the United States.[152]

Concurrently, the less effective methods, with less of a threat to civil rights, are minimally useful to punish employers because they shift the punitive action back to the alien. Under the "new hire reporting" proposal, for instance, the employer would become little more than an information-gathering arm of the government, and the punitive/deterrent notions behind employer sanctions would disappear. Thus, as a proposal becomes less effective, it no longer is one of "employer sanctions." Each proposal, nevertheless, deserves individual scrutiny.

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[151] The North comparison chart, *see* Table 2 *infra*, lays out the most talked about continuum. Behind this search for the solution is a sense that employer sanctions proponents believe that designing a mechanistic system is [illegible] same as designing a law enforcement program. The LEAA experience shows clearly that mechanical sophistication helps ease the job of policing but does not replace the human judgment of officers and other analysts. Enforcement proposals, like employer sanctions, must take into account the complex human factor in society to be successful.

[152] Aptheker v. Secretary of State, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

Table 2

Comparison of Four Alternative Systems to Discourage the Employment of Undocumented Workers

(assumes passage of employer sanctions legislation)

Systems Impacts	Work Permit	Call-In Data Bank	New Hire Reporting	Multi-Document Screening by Employers
Impact on Legal Workers	newly hired workers must show card	minimal on most; a minority, notably the young, would have to file applications	new employees must fill out half-page form	all new employees must show some documents to employer
Impact on Employers	all employers must screen new workers for this card	all must make phone calls about new employees	employer must forward copies of form to government	substantial decision-making responsibility
Differential Impact, If Any, on "Foreign Looking" Workers	none	none	such workers more likely to be excluded or screened more thoroughly	such workers more likely to be excluded or screened more thoroughly
Decision-Maker (re worker's legitimacy)	Government	Government	Employer, as audited off-site by INS	Employer
Need for New Document	yes	no	yes	no
Degree of Effectiveness	very effective	effective	effective to the extent that reports are monitored, followed up	least effective
Degree of Opposition Expected	very substantial	substantial	substantial	substantial
Cost to Government	most expensive	moderate cost	low cost	low cost

D. North, Keeping Undocumented Workers Out Of The Work Force: Evaluation Of Alternative Strategies, Exhibit A (May 1978) (Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C.).

A. The ID Card

The work identity card is the simplest, most efficient method for employers to screen workers. The government would issue a card to any person wishing to enter the job market or change jobs if that person could prove he is a citizen or an alien permitted to work. Any card would have to allow for some variation of work right to reflect the law; foreign students, for instance, are permitted to work no more than 20 hours per week with permission during the school year. If the Social Security card were used, it would also have to be coded to allow for separate, non-employment purposes, such as a foreign visitor without work permission opening a bank account. Once a worker had a card, he simply would present it to the employer who would verify that the applicant was the cardholder. Employers might verify the applicant's status visually, by questioning, or by a machine that could, for example, check the person's fingerprints against prints on the card. The employer would then record this information and retain records for government checks. An employer who did not ask for a card or who did not keep records would be liable for employer sanctions.

This method would be the purest employer sanctions system because it focuses upon the employer's screening responsibilities. An employer who did not take the steps of verification and record keeping would be punished. Secondarily, the system would provide cause for INS employees to question workers. Because workers would not be required to carry their cards with them daily, presumably they would have to be asked to bring them for INS checks, or INS investigators would undertake questioning without the benefit of cards.[153] Employer sanctions would be only a supportive mechanism for the principal concern, discouraging employment of illegal aliens.

The card raises several problems. First, once it became adequately universal, perhaps within twenty years, its attractiveness for other control purposes would be so strong that it would quickly become a national identity card.[154] Second, though its proponents claim it would be hard to counterfeit or tamper with, as a passport to the U.S. labor market in a world increasingly strapped for relatively well paying jobs, it would become so valuable that organized crime surely would find it a lucrative field. The Federal Advisory Committee on False Identification noted precisely this possibility of attendant corruption and recommended against a national identification document.[155]

Third, for a number of years, some citizens would find it difficult to get a card because they are not part of the record system in this country. Also, citizens who are already marginal to the economy may be forced fully underground both from lack of knowledge and fear of government.

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[153] One should keep in mind that only persons hired after the system went into effect would have cards.

[154] *See* U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 65-70 (1980). With two dissents, the U.S. Commission on Civil Rights strongly opposed such a card. "Congress should *not* enact legislation for the development and implementation of a compulsory national identity card or work permit system." *Id.* at 74 (emphasis in original). *See generally* J. RULE, D. MCADAM, L. STEARNS & D. UGLOW, THE POLITICS OF PRIVACY (1980) [hereinafter cited as J. RULE & D. MCADAM].

[155] FEDERAL ADVISORY COMMITTEE ON FALSE IDENTIFICATION, THE CRIMINAL USE OF FALSE IDENTIFICATION (Nov. 1979).

Fourth, it is probable that the only prosecutions will be brought against those employers who actually have hired undocumented aliens. Prosecutors are unlikely to charge employers who do not ask for cards, do not keep records, but only hire citizens knowing the charges would be subject to extensive litigation and ultimately to jury nullification.

Finally, to the extent that prosecutions are selective and directed not to the employer but rather to the employee, hiring discrimination will develop. Only persons who appear to be foreign will be checked by employers and if any doubts emerge they will be turned away. For example, an Anglo who forgets his card might be hired and told to bring it tomorrow, whereas an Hispanic who forgets it will not be hired even tentatively.

B. The Data Bank

To avoid the traditional American fear of internal passports associated with an ID card, a centralized data bank has been proposed.[156] This computer bank would store information on every person who might be in the workforce or who wishes to enter it. Some proposals call for the merger of existing data systems such as military records, social security records, and even Internal Revenue Service personal identifying data. Other proposals call for establishing a new system that would record the essential data on a person who comes to the government for labor clearance. Such data may include name, birthplace, birth date, mother's maiden name, and elementary school. It might also include fingerprints if technology permitted. The system would not include address because it quickly might become obsolete.

Although the political perceptions may be somewhat different from those associated with ID cards, similar arguments to those concerning ID cards apply to data banks, particularly as police cars increasingly become equipped with computer terminals. A card system, too, may be linked to a computer if the ID card has to be checked out, which would make the data bank more than a passive repository of information. In some ways, a data bank is more ominous than a card system for it can be used to obtain information on a person without the person's knowledge. Thus, the privacy concerns of the data bank proposal are large.

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[156] The idea of a universal identifier social security card has been active since the Social Security Board was established in 1935. *See* J. RULE & D. MCADAM, *supra* note 154, at 99-100, 142-45.

Every official who has overseen the system, including Patricia Roberts Harris, Secretary of Health and Human Services in the Carter Administration and, by virtue of her position, one of the sixteen Commissioners of the Select Commission on Immigration and Refugee Policy, has sought to protect the Social Security System from such proposals. Success has been mixed.

C. *New Hire Reporting*

Here, the employee would sign an affidavit, such as the one in Form 1, saying he is a citizen or a legal alien and, if the latter, would provide his documentation. Some proposals call for all employees to present documentation.[157] The weakness of this system is obvious. It is open to abuse by employees using false documents and by employers making judgments about people and documents that they are not equipped or trained to make. The enforcement focus shifts from the employer to the employee. The government provides virtually no screening assistance to the employer, making it unlikely that prosecutions will be brought against anyone other than the flagrant violator who has determinedly hired undocumented aliens. "Employer sanctions" might essentially be replaced in nomenclature by "employer license to discriminate."

D. *Multiple Documents*

In this proposed system, a range of documents would be authorized for employer scrutiny, and no centralized government reporting would be required, though records must be kept for INS on-site inspection. These records might include passports, other government-issued ID cards, and birth certificates. This system, of course, easily could be penetrated if only because the United States has no uniform, secure birth record system. Cheating would be fairly widespread, although less sophisticated foreigners might be deterred from entering the country. Again, the concept is based on employee screening rather than employer sanctions.

The proposal includes telling employees that the form will be sent to the INS for verification.[158] The assumption is that many undocumented aliens will be frightened away; but there is real reason to believe that legal aliens might be equally concerned. Employer returns of employee records would be checked in two ways: (1) data on employee forms would be randomly verified, for example by cross-checking with military records, and (2) the records of a particular employer or type of business might be verified first through existing data banks and then through visits to the employer where personnel records would be checked against the filed employee identity forms and discrepancies checked further by means of questioning employees.

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[157] *See* D. North & J. Wagner, Enforcing The Immigration Law: A Review Of The Options, at 59-71 (Draft, June 1980) (Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C.) (prepared for Select Commission on Immigration and Refugee Policy).

[158] The authors wonder whether the INS is capable of verifying any documents given its record of losing files which the authors and others have experienced.

Form 1
New Hire Reporting Form

DATE OF HIRE

NAME OF EMPLOYER	EMPLOYER NUMBER
ADDRESS	( ) TELEPHONE NUMBER
TYPE OF BUSINESS	$ WAGE PER WK/HR
NAME OF WORKER	SOCIAL SECURITY NUMBER
ADDRESS	
( ) TELEPHONE NUMBER	/ / DATE OF BIRTH

DO YOU POSSESS ONE OF THE FOLLOWING? (if yes, note number)

U.S. PASSPORT _yes _no	U.S. CITIZEN CARD _yes _no (form I-197)	DISCHARGE FROM U.S. ARMED FORCES _yes _no
#	#	#

If one or more of the above are answered "yes" do not complete the following section.

COMPLETE BLOCK BELOW CORRESPONDING TO YOUR STATUS IN THE U.S.

☐ United States Citizen, Native Born or by Derivation

Place of Birth ____________

Mother's Maiden Name ____________

☐ Naturalized Citizen A-Number ____________

☐ Permanent Resident Alien A-Number ____________

☐ Other - Describe status below; if you have a nonimmigrant visa, indicate visa class (A-1, G-1, I-1, etc.) and date on which your authorized stay expires.

I, the employee, certify, under penalty of perjury, that I am entitled to work in the United States and that the information given is true and accurate.

Employee Signature Date

D. North, Keeping Undocumented Workers Out Of The Workforce: Evaluation Of Alternative Strategies, Exhibit C (May 1978) (Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C.).

E. Analysis of Proposed Identification Systems

Although each system has its unique drawbacks, ranging from laying the groundwork for a totalitarian police state to obvious inefficacy, they all share in common little regard for civil rights. Discrimination will be the hallmark of any employer sanctions scheme and that fact alone is sufficient reason to reject the proposals.[159]

When people rather than documents are being hired, there is no such thing as an objective verification program. Documentation must be evaluated in light of the person who presents it, so employer or government screener subjectivity will never be eliminated. Not only will job applicants who look foreign be scrutinized more rigorously and possibly rejected if screening becomes too costly in terms of time spent by employers or government personnel, but workers who frequently change employers will experience many screenings and thus disproportionate risk of employer or government error. These workers are predominantly minorities and women.[160] In addition, workers from lower class minority groups who have been marginal to many of society's data systems, or at least to those identification systems acceptable to employer sanctions screeners, may have difficulty documenting their legality for employers and thus may experience more frequent referral for government review. Furthermore, any temporary permit system meant to offset bureaucratic confusion and delay would not only risk error and frustration and perhaps even deportation of citizens, but also would decrease employment prospects with employers who do not recognize or trust temporary documents or who refuse to risk hiring someone who may have difficulty being documented.[161] Racial, ethnic, and alienage characteristics will be used to direct this group of persons to the government bureaucracies.

Employer perceptions toward both individuals and the program will be very important. To the extent program effectiveness depends upon vigilance and employer fear of punishment, and vigilance in turn means skepticism toward certain people, anyone who is either "foreign-looking" or unfamiliar will have a harder time than an "American-looking" person in removing the government constructed barriers to labor market access.[162] The employer who wishes to "play it safe" inevitably will be overinclusive in his rejections and referrals for government screening.

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[159] The authors are indebted to many observers of the processes of the Select Commission on Immigration and Refugee Policy, including Carolyn Waller of *Interpreter Releases*; David Carliner of Carliner and Gordon; John Shattuck, Legislative Director of the American Civil Liberties Union; and Carol Stepick and Dale Frederick Swartz of the Alien Rights Law Project, who have found the employer sanctions proposals to be without true merit, both broadly and in their specifics, and dangerous in their civil liberties consequences. We also appreciate the work of the Georgetown University Law Center's Institute of Public Representation, Amita Pandya, Douglas Parker, and Erick Glitzenstein, so thoughtfully presented in their paper on employer sanctions, *supra* note 134.

[160] *See* U.S. Equal Employment Opportunity Commission, Equal Employment Opportunity Report—1973 Patterns for Minorities and Women in Private Industry xvii (1975).

[161] A person who might have difficulty being documented is not always equivalent to an undocumented alien. Some citizens may be difficult to document. For instance, a person born outside a hospital in a rural area might never have obtained a birth certificate or a Social Security card, so it would be very difficult for him to prove citizenship via documents.

[162] Lawful immigrants often are generally classified as "illegals" by persons concerned about illegal immigration problems. U.S. Dep't of Labor, Illegal Immigration and U.S. Foreign Policy (October 1980).

Any administrative system like "New Hire Reporting" that leads to INS on-site inspection following paper review will simultaneously prompt employers to err on the side of caution so as to avoid INS interruptions and permit INS officers themselves to select persons for questioning, ostensibly from the "objectivity" of documents. In reality, however, the selection will be influenced by the person's appearance, thereby raising substantial questions under the fourth amendment standards of reasonable suspicion.[163] Under an identity card system, INS spot checks and raids will cause some employees to carry their cards to work and perhaps cause employers to demand that they do so. If this becomes the norm, state and local police officers may expect cards to be carried, especially by foreign-looking persons, and treat them as internal passports. Further, legislative and regulatory standards might soon be established permitting state and local officials to require all travelers during declared emergencies, ranging from riots to blackouts to high crime zones, to carry their ID cards, with arrest and other penalties for noncompliance.

Regardless of the employer sanctions system one chooses, violations of Title VII of the Civil Rights Act of 1964 and of the fifth and fourteenth amendments are possible. When subjective hiring results in discrimination against the disadvantaged and the minority[164] so that access is frustrated by reasons unrelated to job qualification,[165] Title VII may be violated. To the extent that persons are barred from competing equally due to suspicions raised about them by a government labeling program, they may have been deprived of liberty and property without due process[166] and may also belong to similarly situated groups being discriminated against in contravention of equal protection principles.[167]

Finally, if discrimination is as deep as anticipated and strikes against "insular minorities,"[168] courts will apply a "strict scrutiny" test[169] to the cause of these problems. It is hoped that any employer sanctions scheme will fail to be implemented; a permanent injunction could be obtained against any expenditure of funds on the ground that proponents did not meet the "least restrictive alternative" test[170] and could not argue successfully that such an intrusion into the domestic labor market was immune to challenge as a congressional exercise of plenary power to regulate immigration.[171] This is because, regardless of the identity modality suggested for employer sanctions, sanctions remain but one option model among a group focused on interior enforcement. Alternatives include enforcing a range of labor laws directed against worker exploitation and toward establishing a professional, legally-trained police force, perhaps within INS, solely responsible for enforcing the immigration laws with no involvement of other government service agencies. Moreover, even if not clearly unconstitutional, Congress should strongly consider the policies behind Title VII and the equal protection provisions of the U.S. Constitution when making any policy on employee sanctions proposals.

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[163] INA offenses often invoke criminal as well as civil penalties (deportation is a civil penalty, 8 U.S.C. § 1252 (1976); Jolley v. Immigration & Naturalization Serv., 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971)), so the fourth amendment cannot be disregarded. *See* Brown v. Texas, 443 U.S. 41 (1979); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973).

[164] *See, e.g.*, Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972).

[165] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[166] *See* Vitek v. Jones, 445 U.S. 480 (1980); Meachum v. Fano, 427 U.S. 215 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972).

[167] *See* text accompanying notes 24-28, 50-60 *supra*.

[168] United States v. Carolene Products Co., 304 U.S. 144, 152, 153 & n.4 (1938) (dictum) (Stone, J.).

[169] *See, e.g., In re* Griffiths, 413 U.S. 713, 721-22 (1973); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

Thus, employer sanctions need scrutiny both as means and as ends. The ends concern advocate assumptions about the undocumented alien "problem" and its deterrence. The means concern law enforcement principles and identity schemes. Inherent in employer sanctions proposals is an unsettling disregard for American traditions respecting individual rights and effective and fair law enforcement. Claims made for this "scorched earth" idea are so unsubstantiated that the idea itself of employer sanctions is inherently unsound. Regardless, the means needed to implement employer sanctions so threaten U.S. traditions that the idea should be rejected on that basis alone.

VII. Conclusion

This article is as much about attitudes as it is about policies and proposals. Although immigration has been a central theme of the United States for over two centuries, immigration policy has been a backwater. The Immigration and Naturalization Service today, for example, is asked to do a monumental though ill defined job with antiquated tools and insufficient budget and staff. The Visa Office of the Department of State has only recently begun to use computers. During its twelve years of existence, the Law Enforcement Assistance Administration had no programs to undertake research or to develop technical competence in immigration law enforcement. The Immigration and Nationality Act is also likely to remain a confusing patchwork, built upon a law devised during the McCarthy era, because of the Select Commission's avoidance of fully meeting its mandated responsibility to "simplify and clarify" the Act.

Given this neglect, it is little wonder that the contemporary surfacing of international migration as an overriding global issue like population growth and resource depletion is met by panic. Like them, it is second only to nuclear war as a worldchanging force. International migration is also a symptom of population and resource pressures, of political instability, and of human rights violations as well as being a direct reflection of those affirmative desires for a better life that have brought most current U.S. citizens or their ancestors to this nation.

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[170] *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967).

[171] Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

Americans are a "people of all people" and therefore sense the economic and cultural benefits of immigration. Few U.S. citizens would wish to close the doors of the United States, even if that could be done easily. Nevertheless, many current immigration policy proposals would require fundamental restructuring of traditional personal relationships in order to obtain control over undocumented foreign migration into the United States. Structuring employment and other relationships to solve the "illegal alien problem" is a tactic having not only questionable utility but also dangerous tendencies for fostering hostility, disloyalty, and distrust among U.S. residents. This is an enormous price to pay for an uncertain resolution to an as yet poorly understood global problem. The American people should find "scorched earth" proposals offensive and extremely dangerous to the country. There is a crisis, but it is one of confidence, of expertise, and of experience. Immigration policy from both domestic and international perspectives must be made a priority matter. If it is not, "scorched earth" policies may be the quickest answer to the enduring unsettlement of fundamental U.S. traditions of freedom such as privacy, travel, and association. Were the United States to permit such perversion of its beliefs and institutions, the country surely will reap in the next century what is sown today.